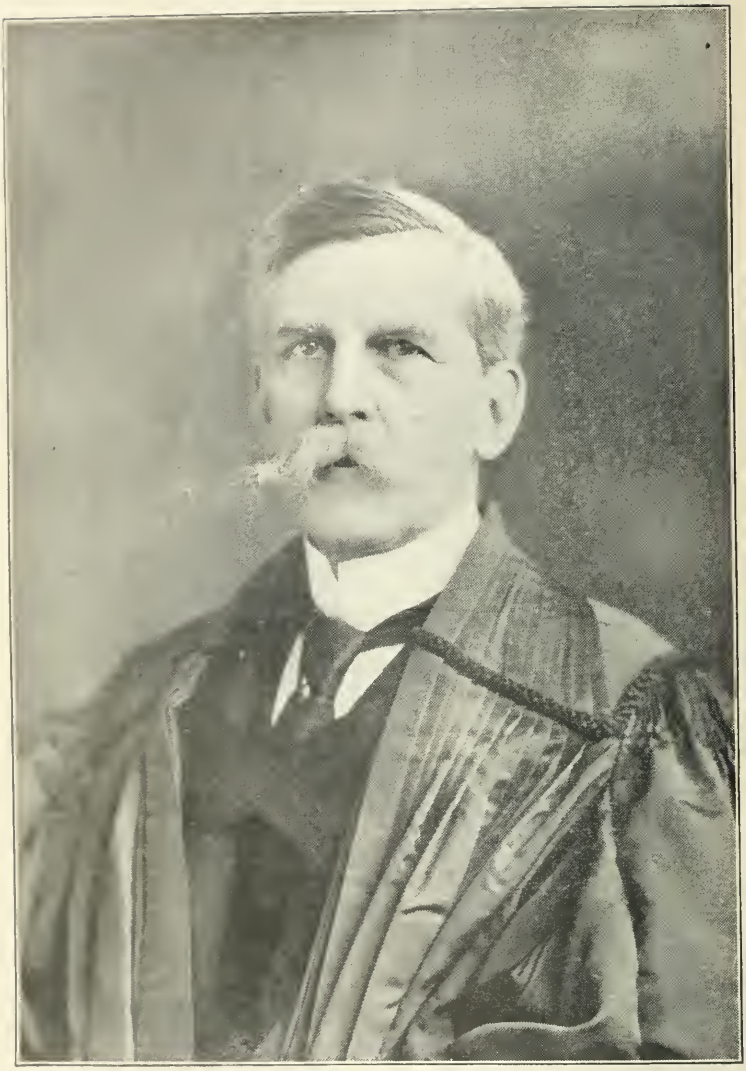
UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

This book is DUE on the last date stamped below

Digitized by the Internet Archive
in 2008 with funding from
Microsoft Corporation

http://www.archive.org/details/chadmanscycloped09chad



O. W. HOLMES JR.

CYCLOPEDIA OF LAW

Principles of the Law of Private and Public Corporations

INCLUDING

THE HISTORY, FORMATION, CREATION AND CLASSIFICATION OF CORPORATIONS; CORPORATE POWERS AND LIABILITIES; MUNICIPAL CORPORATIONS; ADMINISTRATIVE CORPORATIONS, ETC.

VOL. IX

EDITOR IN CHIEF

HON. CHARLES E. CHADMAN, LL.B., LL.M., LL.D.

Assisted By

A CORPS OF LEGAL EXPERTS

PUBLISHERS

AMERICAN SCHOOL OF LAW

CHICAGO, U. S. A.

36347

T
C344Tc
1906

COPYRIGHT, 1906
BY FREDERICK J. DRAKE & CO.
CHICAGO

C110

C 34
v.3
Cop 1

AUTHORITIES CONSULTED.

E. S. ABBOTT,
Municipal Corporations.

W. A. ALDERSON,
Judicial Writs and Processes.

W. C. ANDERSON,
Law Dictionary.

W. F. BAILEY,
Personal Injuries.

F. H. BACON,
Life Insurance.

J. B. BISHOP,
Statutory Crimes.

G. T. BISPHAM,
Principles of Equity.

M. M. BIGELOW,
Life and Accident Insurance.

E. C. BENEDICT,
American Admiralty.

C. F. BEACH,
Modern Equity Practice.

E. E. BALLARD,
Real Property Law.

S. E. BALDWIN,
American Railroad Law.

W. E. BENJAMIN,
Bills, Notes and Checks.

W. BLICKENSDERFER,
Students' Review.

J. H. BREWSTER,
Conveyancing.

W. BLACKSTONE,
Commentaries.

G. BLISS,
Life Insurance.

H. C. BLACK,
Constitutional Problems.

C. L. BATES,
Federal Equity Procedure.

W. H. BROWNE,
Law of Trade Marks.

H. F. BUSWELL,
Personal Injuries.

F. M. BURDICK,
Partnership.

A. M. BURRILL,
Assignments.

J. BOUVIER,
Law Dictionary.

I. BROWNE,
Domestic Relations.

S. V. CLEVENGER,
Spinal Concussion.

G. A. CLEMENT,
Fire Insurance.

J. C. CHITTY,
Contracts.

C. D. DRAKE.
Attachment Suits.

G. B. DAVIS,
Military Law.

M. E. DUNLAP,
Elementary Law.

E. S. DRONE,
Copyright Law.

R. T. DEVLIN,
Law of Deeds.

C. B. ELLIOTT,
Public Corporations.

F. GIAQUE,
Notary's Manual.

S. GREENLEAF,
Evidence.

W. E. HAGAN,
Disputed Handwriting.

A. M. HAMILTON,
Medical Jurisprudence.

G. E. HARRIS,
Damages by Corporations.

J. G. HAWLEY,
International Extradition.

E. W. HUFFCUT,
Negotiable Instruments.

J. L. HIGH,
Injunctions.

F. N. JUDSON,
Interstate Commerce.

J. A. JOYCE,
Damages.

J. D. LAWSON,
Contracts.

J. R. LONG,
Domestic Relations.

S. S. MERRILL,
Mandamus.

J. W. MAY,
Law of Crimes.

G. L. PHILLIPS,
Code Pleading.

R. R. PERRY,
Common Law Pleading.

J. H. PURDY,
Private Corporations.

H. E. PAINE,
Law of Elections.

F. POLLOCK,
Contracts.

J. N. POMEROY,
Municipal Law.

J. RAM,
Legal Judgments.

J. J. REESE,
Toxicology.

W. C. ROBINSON,
Elementary Law.

W. H. RAWLE,
Covenants for Title.

W. C. RODGERS,
Domestic Relations.

H. D. SEDGWICK,
Law of Damages.

J. SCHOULER,
Personal Property.

C. H. SCRIBNER,
Dower.

G. SHARSWOOD,
Law of Lectures.

W. L. SNYDER,
Mines and Mining.

G. H. SMITH,
Elements of the Law.

A. A. STEARNS,
Suretyship.

J. F. STEPHENS,
Digest of Evidence.

H. TAYLOR,
International Law.

C. G. TIEDEMAN,
Real Property.

B. M. THOMPSON,
Equity Pleading.

H. C. UNDERHILL,
Criminal Evidence.

G. W. WARVELLE,
Abstracts of Title.

W. P. WILLEY,
Procedure in Pleadings.

F. WHARTON,
Law of Negligence.

W. WINTHROP,
Military Law.

T. A. WALKER,
American Law.

J. H. WIGMORE,
Examinations in Law.

J. G. WOERNER,
American Guardianship.

PREFACE.

In presenting to the public the elementary principles of the law of private and public corporations, it is believed that a two-fold benefit may be conferred: First, students of law, and others desirous of informing themselves upon these subjects, will be given a brief and economical hand-book with which to do so. Second, an abridgment of the rules of law governing corporations, will, it is hoped, tend to inform the general public of the fact that many loop-holes exist in the State's control of these public agencies, and assist them in evolving a rational method of regulating the growing evils resulting from the abuse of corporate powers. To this latter end the author has, in the foot notes, called special attention to instances where the wise policy of the law, through the cunning of incorporators, has been rendered abortive of its true aims, and used to assist in increasing the burdens of the masses.

As the twelve volumes composing the Cyclopedia of Law near their completion, and the author is led to believe from their flattering reception that they will find a lasting place in the field of legal study, it is desired to supplement them, at some future time, with a *Series* of "Case Books," giving at more length than could be done herein, the leading cases on the various

branches of law treated in the books of the Cyclopedia of Law. This plan, if carried out, it is believed, will give the student a very complete and valuable, as well as economical legal library.

Charles E. Chadman.

Conneaut, Ohio, Sept. 1st, 1905.

ABBREVIATIONS.

(SEE ALSO THE ABBREVIATIONS GIVEN IN PREVIOUS NUMBERS)

Atl.—Atlantic Reporter.
B. Monr.—B. Monroe's Reports, Kentucky Court of Appeals.
Barb.—Barbour's Reports, New York Supreme Court.
Burr.—Burrow's Reports, English King's Bench.
Bush.—Bush's Reports, Kentucky Court of Appeals.
C. C. A.—County Court Appeals.
C. & P.—Carrington & Payne's Reports, English Nisi Prius.
Co.—County, Company.
Colo.—Colorado Reports.
Corp.—Corporation.
Ex. or Exch.—English Exchequer Reports.
Fed. Rep.—Federal Reporter.
Gratt.—Grattan's Reports, Virginia Court of Appeals and General Court.
How. or How. (U. S.)—Howard's Reports, United States Supreme Court.
Ia.—Iowa Supreme Court Reports.
La. Ann.—Louisiana Annual Reports, Louisiana Supreme Court.
Met. (Ky.)—Metcalfe's Reports, Kentucky Court of Appeals.
McLean (U. S.)—McLean's Reports, United States Circuit Court.
Mor. Priv. Corp.—Morowetz Private Corporations.
Munic. Corp.—Municipal Corporations.
N. Dak.—North Dakota Supreme Court Reports.
Rich. or Rich. (S. C.)—Richardson's Law Reports, South Carolina Court of Appeals.
Scam. or Scam. (Ill.)—Scammon's Reports, Illinois Supreme Court.
So. or So. Rep.—Southern Reporter.
Swan, or Swan (Tenn.)—Swan's Reports, Tennessee Supreme Court.
Tenn. Ch.—Tennessee Chancery Reports.
T. R.—Term Reports, English King's Bench.

CONTENTS

Preface iii
Abbreviations v

PRIVATE CORPORATIONS.

CHAPTER I.

A Corporation Defined 1
Theories as to Corporate Entity or Personality 3
Definition and Theory of the Franchise 4
Examples Showing When a Corporation is Considered as a Person, a Collection of Persons, a Franchise. 6
Corporation Distinguished from Partnerships, Joint Stock Companies, etc. 8
Tests of Corporate Existence 12
Classification of Corporations 13
Authorities on the Law of Private Corporations 15

CHAPTER II.

Creation of a Corporation in General 17
The State's Functions—Power to Create 17
Same Subject—Evidence of the Sovereign's Consent.... 18
Same Subject—Form in which the Legislative Authority is Exercised 20
Same Subject—Limits in Legislative Authority 23
Same Subject—Federal Constitutional Restrictions on State Legislatures 24
Same Subject—State Constitutional Limitations 24
Same Subject—Powers of Congress to Create Corporations 25
Same Subject—Powers of Territorial Legislatures 26
The Promoter's Functions—Promoters Defined and Classified 26
The Corporate Charter—Its General Nature 29

Same Subject—Offer and Acceptance 30
Same Subject—What Constitutes the Charter..... 31
The Association—Its Necessity and Nature 33
Same Subject—Forms of Association Contracts 33
Same Subject—Conditional Subscriptions—1. Express and Implied Conditions 37
Same Subject—Conditional Subscription Prior to Incorporation 38
Same Subject—Conditions Precedent and Subsequent ... 39
Same Subject—Conditional Delivery of Subscriptions.... 39
Same Subject—Fraud and Mistake as Affecting Subscriptions 40
Same Subject—Parties That May Subscribe 41
Organization—In General 41
Same Subject—Proof of Organization 42
Same Subject—Commencement of Corporate Existence.. 42
Same Subject—Condition of De Jure Existence..... 43
Same Subject—Conditions of De Facto Existence..... 44
Same Subject—Conditions of Existence by Estoppel.... 44
Same Subject—What Parties Will be Estopped..... 45
Same Subject—Effect of Failure to Comply With Conditions 45

CHAPTER III.

Members—Their Necessity 47
Same Subject—Acquisition of Membership..... 47
Integral Parts 48
Organs of Action 48
Same Subject—Qualification of Agents and Officers.... 48
Same Subject—Functions of Shareholders and Directors 49
Same Subject—Functions of the Other Officers..... 49
Internal Relations of the Corporation Arising From the Contracts Contained in or Resulting From the Charter 50
Corporate Funds, Their General Purpose and Designation 52
Same Subject—Capital and Capital Stock 52
Same Subject—Purpose of Capital Stock 53
Same Subject—Capital Stock and Shares of Stock Distinguished 54
Same Subject—Kinds of Shares 56

Same Subject—Right to Create a Capital Stock a Franchise 58
Same Subject—Nature of Shares of Stock 58
The Corporate Name—Its Necessity 60
Same Subject—Acquisition of a Name..... 60
Same Subject—Rights in the Corporate Name..... 61
Same Subject—Effect of Misnomer 61
Same Subject—How the Corporate Name May Be Changed 62
The Corporate Life—Meaning of Perpetual Succession.. 62
Same Subject—Corporate Action Taken in Shareholders' Meeting 62
Same Subject—Notice of Shareholders' Meeting..... 63
Same Subject—What Will Constitute a Quorum 63
Same Subject—Place of Meeting 64
Same Subject—Directors' Meeting 64
Same Subject—How Corporate Contracts Should Be Executed 65
Dissolution of Corporations—Method of Dissolution.... 65
Same Subject—One Man Companies 66
Same Subject—Effect of Dissolution 66

CHAPTER IV.

Powers in General—Theories of Corporate Capacity.... 69
Classification of Corporate Powers 69
Same Subject—General Rules for Construing Corporate Charters 70
Particular Powers—Power to Contract 71
Same Subject—Power to Contract Debts and Borrow Money 71
Same Subject—Power to Issue Negotiable Instruments.. 72
Same Subject—Power to Issue Accommodation Paper.. 72
Same Subject—Power to Be Surety or Guarantor..... 72
Same Subject—Power to Form Partnerships 73
Same Subject—Power to Enter into Trade Combinations 73
Same Subject—Power to Form Unincorporate Trusts.. 75
Same Subject—Incorporated Trusts 75
Same Subject—Power to Consolidate 76
Same Subject—Power to Hold and Acquire Real Property 77

Same Subject—Power to Take by Devise..... 78
Same Subject—Power to Acquire Personal Property.... 78
Same Subject—Power to Acquire its Own Shares..... 78
Same Subject—Power to Acquire Stock in Other Corporations 79
Same Subject—Power to Alienate Property 79
Same Subject—Power to Act in a Personal Relation.. 80
Same Subject—Right to Sue 80
Same Subject—Suits Against Corporations 81
Same Subject—Pleading Corporate Existence 82
Same Subject—The Right to Have a Corporate Seal.... 82
Same Subject—Corporation's Powers to Make By-laws 83
Concerning the Doctrine of Ultra Vires—Meaning of the Term 84
Same Subject—As to Executed Contracts 85
Same Subject—Executory Contracts 86
Same Subject—Partially Executed Contracts 86
Same Subject—Who May Complain of Ultra Vires Contracts 87
Liabilities of Corporations for Torts and Crimes..... 87

CHAPTER V.

The State's Means of Control 91
The State and Its Own Corporations—Control by the Courts 92
Same Subject—For What Causes Forfeiture May be Had 94
Same Subject—Forfeiture as Effected by Statutes of Limitation and Waiver 94
Same Subject—The State's Power to Control by Mandamus 95
Same Subject—Control by Courts of Equity..... 95
Same Subject—Control by Private and Public Visitor.. 96
Same Subject—Control by the Legislature 97
Same Subject—The Power of Eminent Domain..... 97
Same Subject—The Police Power 98
Same Subject—The Taxing Power 99
Same Subject—Power to Repeal and Forfeit 104
Same Subject—Power to Amend 105
The State and National Corporations—In General..... 106

The State and Foreign Corporations—Right of the Foreign Corporation in a State 107
Same Subject—Right to Engage in Commerce..... 107
Same Subject—What is Interstate or Foreign Commerce? 107
Same Subject—Right of State to Exclude Foreign Corporation 109
Same Subject—Methods of Excluding or Restricting Foreign Corporations 109
The National Government and State Corporations—The Taxing Power a Means of Controlling the Trusts.. 111
Same Subject—Adopting State Regulations 111
Same Subject—Interstate Commerce 112
Same Subject—Anti-Trust Acts 112

CHAPTER VI.

The Corporation and Its Promoters—Duties of Promoters 115
Same Subject—Liabilities of Promoters 115
Same Subject—Liability of Corporation for Acts of Promoters 116
The Corporation and Its Officers—General Relation.... 117
Same Subject—General Rule as to Duties of Officers.... 117
Same Subject—Right to Remove Corporate Officers.... 118
Same Subject—Right of Officer to Deal With Corporation 118
Same Subject—Right to Receive a Salary 119
The Corporation and Its Shareholders 120
Same Subject—Right of Corporation to Collect Subscriptions 120
Same Subject—Calls for Payment of Subscriptions..... 121
Same Subject—Evidence of Membership 121
Same Subject—Right to Vote 122
Same Subject—Voting by Proxy 122
Same Subject—Irrevocable Proxy 123
Same Subject—Voting Trusts 123
Same Subject—Cumulative Voting 123
Same Subject—Dividends 124
Same Subject—Who is Entitled to Dividends..... 125
Same Subject—Dividends as Between Life Tenant and Remainderman 125

Same Subject—Transfer of Shares—The Right to Transfer 126
Same Subject—Registration of Transfer of Shares..... 126
Same Subject—Effect of Transfer of Stocks Upon Forged Power of Attorney 127
Same Subject—Effect of Transfer of Shares in Breach of Trust 128
Same Subject—How a Gift of Shares May be Made.... 128
Same Subject—Effect of the Transfer of Shares..... 129
Same Subject—Remedy for Refusal to Transfer,..... 129
Same Subject—Shareholder's Right to Inspect Books.. 129
Same Subject—Right to Share in Increase of Stock.... 130
Same Subject—Shareholder's Right to Sue for Money Due the Corporation 130
Creditors—Creditors and the State 131
Same Subject—Creditors and the Corporation 131
Same Subject—Preferring Creditors 132
Same Subject—Assets are Regarded as a Trust Fund for the Protection of Creditors 132
Same Subject—Right of Creditor to Prevent Dissipation of Funds 133
Same Subject—Creditors and Officers 133
Same Subject—Statutory Liability of Officers 134
Same Subject—Creditors and Shareholders 134
Same Subject—Effect of Agreement to Pay in Property on Rights of Creditors 137
Same Subject—Liabilities of Shareholders Under Special Statutes 138
Same Subject—When Liability Penal in Form Will be Considered Contractual 139
Same Subject—Enforcement of Statutory Liability in Other Jurisdictions 140

PART II.

PUBLIC CORPORATIONS.

CHAPTER I.

What the Subject Includes 141
Some Pre-requisites to the Creation of a Public Corporation 141
Creation of Public Corporations in General 142
Public and Private Corporations Distinguished 143
Public and Municipal Corporations Distinguished..... 144
Classifications of Public Corporations 147
Authorities on Public or Municipal Corporations 147

CHAPTER II.

Three Types of Political Communities Possessing Corporate Powers in America 149
Peculiar Characteristics of Administrative Corporations. 151
Counties 155
Same Subject—The governing Body in the County is the Board of County Commissioners 156
Same Subject—General Principles Governing Commissioners When Acting as an Auditing Board..... 157

CHAPTER III.

Modes of Creating Municipal Corporations in England.. 161
Creation of Municipal Corporations in the United States 161
Legislative Control of Municipalities 164

CHAPTER IV.

Types of Municipal Charters 169
Charters Under Judicial Sanction Considered 172
Methods of Proving Municipal Charters 174
Canons of Construction of City Charters 175
Charter Powers are General and Special 179
Special Charter Powers—As to Parks and Public Squares 179
Same Subject—As to Wharves and Docks..... 181
Same Subject—Power of the City to Maintain and Control Wharves 183
Same Subject—Ferry Franchises 185

Same Subject—As to Providing for the Public Health.. 185
Same Subject—As to Public Markets 187
Same Subject—As to the City's Power to Establish and Maintain Fire Departments to Suppress Fires..... 189
Same Subject—As to Water Supply for City 190
Same Subject—As to Public Lighting 191
Same Subject—As to the Suppression and Prevention of Nuisances 194
Special Limitations Upon Municipal Powers 197
Same Subject—Limitations on the Power to Borrow Money 197
Same Subject—Limitations Upon Municipal Indebtedness 199
Same Subject—Other Limitations 201

CHAPTER IV.

Scope of the Chapter 203
The Right to a Corporate Name 203
Charter Requirements as to a Corporate Seal 205
The Power to Hold Corporate Meetings 206
Same Subject—Action by the Council 207
Same Subject—Municipal Records 210
Same Subject—Ordinances 212
Same Subject—Ordinances—Method of Enactment 214
Implied Limitations Upon the Power of a City to Pass Ordinances 215
Concerning the Publication of Ordinances 217
Power to Enforce Ordinances by Fines or Imprisonment 218
Who Are Required to Take Notice of the Existence of Municipal Ordinances 220
License Power of Municipalities 220
Ordinances Against Public Offenses 224
The General Welfare Clause—Rules of Interpretation... 225
Procedure to Enforce Ordinances 226

CHAPTER V.

Municipal Courts 229
Municipal Property 232
Municipal Property Cannot Be Sold on Execution to Satisfy a Claim Against the City 234

How Municipalities May Acquire Property—The Principles of Dedication as Affecting Municipalities, Considered 236
Same Subject—The Fact of Dedication May be Established in Three Ways 237

CHAPTER VI.

Methods of Transportation 241
Limitations Upon the Power of the City to Control Streets by U. S. Postal Regulations 245
Same Subject—Are Railways a Double Use of Streets and Highways? 248
Remedy for Wrongful Double Use of Streets 250

CHAPTER VII.

Power to Make Public Improvements 251
Liability of the Municipality for Its Torts 254
Dissolution of Municipal Corporations—In England..... 255
Same Subject—How Dissolved in the United States..... 256
Questions for Students 259-271

PRINCIPLES OF THE LAW OF PRIVATE CORPORATIONS.

CHAPTER I.

DEFINITION AND GENERAL IDEA OF A CORPORATION.

Sec. 1201.* A CORPORATION DEFINED.—The definitions given by the courts and text-book writers emphasize the fact that a corporation may be, and usually is, viewed as being—a person, a collection of persons, a franchise, thus:—

Chief Justice Marshall defines a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law."** While Mr. Kyd defines a corporation as: "A collection of many individuals united into one body, under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law, with the capacity of acting in several respects as an individual."*** And Chancellor Kent's definition is: "A corporation is a *franchise* possessed by one or more individuals,

*This book is No. 9 of The Cyclopedia of Law, the former 1200 sections comprise the first eight books of the series.

**Per Ch. J. Marshall in Dartmouth College v. Woodward, 4 Wheat. 517, 636.

***1 Kyd, Corp. 13.

who subsist, as a body politic, under a special denomination, and are vested, by the policy of the law with the capacity of perpetual succession, and of acting in several respects, however numerous the association may be, as a single individual."****

The student will soon ascertain from the cases that a corporation is not only one, but all of these, accordingly as it is viewed as a separate entity; as a composite creation; or as respects its limited and restricted powers. Every corporation aggregate, then, consists of, (a) a collection of individuals; (b) a legal entity, or artificial being, which, in contemplation of law, is largely separate and distinct from its composite membership, and (c) a franchise or privilege derived from the sovereign authority conferring the powers necessary to the existence of the corporation as a separate entity.*

A corporation is regarded as a separate legal entity to the extent that it may as such entity acquire, convey and hold property, contract obligations, incur liabilities, sue and be sued, and may buy from and sell to and contract with its members as with strangers.**

****2 Kent, Com. 267-8.

*The distinction between natural persons and artificial or corporate bodies, created by the policy of the law, was well known to the early law writers, as Lord Coke, who says: "A body politic is a body to take in succession, framed by policy, and therefore it is called by Littleton a 'body politic'; and it is called a 'corporation' or 'body corporate' because the persons are made into a body, and of a capacity to take and grant," etc. Co. Litt. 250a.

**"A corporation is a body, created by law, composed of in-

Sec. 1202. THEORIES AS TO THE CORPORATE ENTITY OR PERSONALITY.—It has been said in the definition of a corporation that it is an artificial being, existing only in contemplation of law, and that the idea of the corporate entity is not real, but fictitious, being a mere figure of speech, which abstract or intangible being is given, by the policy of the law, in certain cases, all the characteristics and attributes of natural persons, but in other cases, chiefly equitable, it will be disregarded, and the court will look behind the corporate entity to the individual members composing it, in order that justice may be done. This theory, known as the *fiction theory*, is the prevailing American view, and is acknowledged by many courts and writers.

Another view or theory as to the corporate entity is advocated by German law writers, called the *organic*

---

dividuals united under a common name, the members of which succeed each other, so that the body continues the same notwithstanding the change of the individuals composing it, and is, for certain purposes, considered as a natural person." Angell & Ames, Corp. Sec. 1.

"A corporation aggregate is a collection of individuals united in one body, under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person, or legal being, capable of transacting some kind of business like a natural person. . . . Such a union as I have mentioned can only be effected under a grant of privileges from the sovereign power of the state. A Corporation is, therefore, said to be a legal being, or the mere creature of law."—Per Bronson J., in People v. Assessors of Village of Watertown, 1 Hill (N. Y.) 620.

theory, in which it is maintained that the personality of a corporation is as real and tangible as that of the state, since, in law, a *person* is anything that is a distinct subject of rights and liabilities, and juristic persons are no more fictitious than is the conception of ownership, since they are subjects of legal rights and duties.

Still another theory is advocated by Doctor Ernst Freund of Chicago University, called the *representative theory*, in which it is sought to show that the rights held and exercised by the corporation are not those of any physical person, but those of the corporation as directed by the majority of its members, that is, the majority vote of the quorum is the representative of all, and this group representing the majority of a quorum, which is the real corporation, is no unreal or fictitious thing, and is the real entity which the corporation represents.

Sec. 1203. DEFINITION AND THEORY OF THE FRANCHISE.—"A franchise is a right, privilege or power of public concern which ought not to be exercised by private individuals at their mere will or pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions, and regulations as the government may impose in the public interest, and for the public security. . . . No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity

is a franchise."* The state in its political capacity is the holder of all franchises in trust for the public welfare; and when it makes a grant of any part of such franchises it does not lose its power of control to see that the powers granted shall be exercised in advancing the public welfare. This is an essential, though implied, condition of the grant, if not conformed to the state may resume its powers and annul the grant as for a condition broken.

The right to be and act as a corporation, mainly based upon historical reasons, is considered, and wisely so, as a right or privilege of public concern. This is true even though the business to be done is of a private nature, such as refining sugar or oil. The business is neither more nor less public than if done by individuals in their private capacity, but the privilege consists in bringing into existence and using in the business the valuable, efficient, impersonal, and in many ways less responsible agency, known as the corporation; this is the matter of public concern, which the state having created, from the plentitude of its power, for the public good, is bound to see to it that its creation shall be so environed that it does not work harm instead of good. The control can only be exercised through the franchise which is the life of the corporation.

Corporate franchises are frequently said to be *primary* and *secondary*. The primary franchise is the privilege to be, exist and act as a corporation; while

*Per J. Bradley, In 127 U. S. 1, 40.

the secondary franchises are such other powers and privileges, as the right to take property by eminent domain, and the like, as may be conferred upon the corporation, for particular purposes or reasons.

Sec. 1204. EXAMPLES SHOWING WHEN A CORPORATION IS CONSIDERED AS A PERSON. A COLLECTION OF PERSONS, A FRANCHISE.—For most purposes a corporation is considered a person or entity; thus, it has rights of property and reputation protected at common law, and under constitutional provisions, very much as natural persons; it has duties arising from its charter and charged upon it by the common law; it is entitled to the benefit of statutes conferring rights or placing obligations upon citizens, though not specifically named. But corporations are held not to be citizens entitled to the benefit of the provision of the federal constitution that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," nor within the meaning of the constitutional provision that no state shall deny to any *person* within its jurisdiction the equal protection of its laws.* They are citizens within the meaning of the acts of congress defining the jurisdiction of the federal courts. As regards the ownership of its property a corporation is a person, the property belongs to it and not to its members; it is held and conveyed in the corporate name

*Ducat v. City of Chicago, 48 Ill. 172; Tatem v. Wright, 23 N. J. L. 429; Pembina, etc., Co. v. Pennsylvania, 125 U. S. 181; 136 U. S. 114.

and not in the name of its members, so suits must be brought by and against it in the corporate name.

A corporation may be considered as a collection of persons from the fact that in the management the majority controls. So, when justice requires, the corporate entity will be ignored, and the rights, duties and obligations of the composing members considered; thus, in matters relating to the changing of the constitution; in determining the rights of the members among themselves in equity; in cases where corporate sins result from the concerted but apparently individual acts of members, or where the corporate entity or organization is used as a cloak to aid in the perpetration of a fraud, the courts will disregard the corporate personality and look back of it to the members.* But the entity will be regarded rather than the membership in determining the situs of the corporation property for taxation, registry, and the like.**

A corporation is considered as a franchise in its relation to the state, with respect;—(a) to the methods by which the state retains control over it, as by the writs of *scire facias* and *quo warranto*; (b) to its incapacity to alienate its franchise without the consent of the state. These result from the principle that the primary franchise is granted by the state to a corporation upon the implied condition that the grantees will

---

*People v. Sugar Refining Co. 121 N. Y. 582; State v. Standard Oil Co. 49 Ohio St. 137; 30 N. E. 279.

**Queen v. Arnaud, 16 Law J. C. L. 50; Smith v. Hurd. 12 Met. 371.

faithfully carry out the purposes for which it was formed. A corporation will also be regarded as a franchise in that (c) its franchise will be considered property for the purpose of taxation by the state; (d) the state is unable to change the franchise or charter without the consent of its members; and (e) from the inability of the majority to change the constitution of the corporation without the consent of all the members. These last three being based on the doctrine that a franchise once granted and accepted, becomes a vested property right in the members, of which they cannot be deprived without their consent.

Sec. 1205. CORPORATION DISTINGUISHED FROM PARTNERSHIP, JOINT STOCK COMPANIES, ETC.—A corporation differs from a partnership:—

1. In origin,—the idea of a corporation being traceable to the public law of Rome; while that of partnership was derived from the customs of merchants in England and on the Continent and from Roman traders.*

2. In creation,—since a corporation can only be created by express authority of the state, a partnership, by mere contract of the parties.

---

*For the history of corporations, see, 2 Kent, Com. 268; 1 Wat. Corp. Sec. 11; 1 Pollock & Maitland Hist. Com. Law, 469. Bodies politic similar to corporations are traceable as far back as the time of Cicero, and even to the laws of Solon of Athens, who lived 500 years previous. Poth. Panel of Just. book 3, p. 109; Dig. lib. 3, tit. 4a.

3. In franchise,—a corporation having a franchise, a partnership none.

4. In management,—a corporation is managed only through its duly authorized officers and agents; in a partnership, each partner or member may act for the firm.

5. In powers,—the corporation can lawfully exercise no powers except those expressly conferred or necessarily implied from those granted, and its powers cannot be enlarged except by the consent of the state; the members of a partnership may do anything by mutual agreement which is not unlawful.

6. In duration,—the corporation is perpetual unless expressly limited, and is not affected by the death, resignation or insolvency of its members; while either of these dissolve a partnership.

7. In ownership of property,—the title to all property is in the corporation; that of the partnership is in the members, who are considered part owners.

8. In litigation,—a corporation sues in its corporate name; the partnership in the name of ts members.

9. In the transfer of interest,—which has no effect on the corporation; but the transfer of a member's interest in a partnership dissolves the firm.

10. In liability of members,—in the absence of statute, members of a corporation are not liable beyond the amount of their shares; while in a partnership each member is liable to the full extent of the firm debts,

11. In dissolution,—a corporation can be rightly

dissolved only by or with the consent of the state; partners may dissolve at any time.

12. In theory of existence,—a corporation is a legal entity; a partnership is not so considered in law, except in certain cases.

Corporations and Joint Stock Companies. A joint stock company is sometimes said to be a partnership with many of the powers of a corporation. It is an evolution of partnership law, excluding some of the incidents of a partnership, as the non-transferability of shares, and the authority of a partner to bind all the others, these being excluded by the contract or statute under which it is formed. While it can be formed, as between the members themselves or the members and those who deal with it with full knowledge, merely by contract, such formation without express authority does not exclude the partnership liability to those who have no knowledge of the facts. All presumptions are in favor of the partnership liability and can be excluded only by express statutory provision or actual knowledge by the party dealing with it. They are usually authorized by statute, with transferable shares, and managed by a board of directors.* The presumptions of corporation law are ex-

*Joint stock companies are formed solely by agreement between the associates, and rest upon their common law right to contract with each other, and are not dependent upon a license or charter from the state as is the case with corporations. They are merely a peculiar sort of partnership. Atty. Gen. v. Ins. Co. 121 Mass. 524; Hedge's Appeal, 63 Pa. St.

actly the reverse, there being no individual liability of the members unless created expressly by the statute. Joint stock companies have no franchise and are not considered legal entities as are corporations.

Corporation and Fraternity or Stock-Exchange. An unincorporated society resembles a partnership more nearly than a corporation; they are not legal entities, and hence those who claim to be agents of such an institution bind only themselves and those who authorize them to act. The members are not authorized to act for one another as in partnerships.

Corporations and Cost-Book Mining Companies. By custom of miners there has grown up an unincorporated association that is quite like a joint stock company, in which the shares are transferable without affecting the continued existence of the association, and only those especially appointed have authority to bind the others, otherwise partnership rules apply.

Syndicates. These are in fact temporary partnerships organized for a particular transaction, such as to purchase or subscribe for a large amount of stock in a corporation to be formed, so as to insure the completion of the proposed scheme. As soon as the special transaction is completed the syndicate terminates, and is governed substantially by partnership rules.

Corporations and State Institutions. There are in many states institutions as state universities, asylums, penitentiaries, and the like, managed by boards created

---

273; Burnes v. Pennell, 2 H. L. Cas. 520; Taft v. Ward, 106 Mass. 518; People v. Coleman, 133 N. Y. 279.

by law, and appointed by the governor or elected by the electors. These are frequently called corporations of a public kind. In some states they are not considered as corporations though possessing corporate powers, and as state institutions are subject to modification at the will of the state, without violating the constitutional prohibition against impairing the obligation of contract.

Sec. 1206. TESTS OF CORPORATE EXISTENCE.—In many cases it is difficult to determine whether a particular institution is a corporation or not. The following tests have been suggested:—(a) In a corporation the individuals composing the corporate body are merged into one separate and distinct artificial entity or personality. (b) If there has been legislative intent to create a corporation this will control in the creating state but not necessarily elsewhere. (c) There are certain attributes and incidents essential to the existence of every corporation which serve as distinguishing characteristics or ear marks, these are; to have continuous succession, under a special name, and in an artificial form, without being subject to dissolution or change of identity by the death, resignation or legal disability of members; to take and grant property and contract obligations, sue and be sued in the corporate name, and to receive other grants and privileges and enjoy them in common. In foreign jurisdictions, the powers conferred rather than the legislative declaration will control in determining the existence of the corporation. The word "corpora-

tion" or "incorporate" need not be used in its creation.*

Sec. 1207. CLASSIFICATION OF CORPORATIONS.—Corporations may be classified as follows:

1. According to their membership, they are *sole* or *aggregate*. In a sole corporation there can be but one member at a time; corporations aggregate are composed of more than one member at a time.*

2. As to their object or purpose, corporations are *ecclesiastical* or religious, and *lay;* which latter are *eleemosynary* and *civil.*

An ecclesiastical or religious corporation was one composed of spiritual persons, clothed with spiritual jurisdiction, as opposed to temporal, and subject to control by the church authorities. They do not exist in this country, as the state cannot confer such jurisdiction, having none itself. So that religious corporations are with us of a civil kind, formed to manage the temporalities of a church. All other than ecclesiastical, were lay corporations, organized for various secu-

*Thomas v. Dakin, 22 Wend. 9; Sutton's Hospital Case, 10 Coke, 23a; 10 B. & C. 349; 44 Cal. 440; 10 Wall. 566.

*The sovereign of England has always been regarded as a corporation sole, because of the office which is clothed with perpetuity; so a bishop, dean, parson and vicar are given as examples of corporations sole in England. In America there has been but one corporation sole created by a state legislature and that in the case of the Roman Catholic Archbishop of Chicago, Illinois; though a governor of a state has been held to be a quasi-sole corporation, also a minister of a parish, as to parish holdings might be so considered. 1 Bl. Com. 469; 2 Kent, Com. 273; Weston v. Hunt, 2 Mass. 500; Terrett v. Taylor, 9 Cranch, 43; McCloskey v. Doherty, 30 S. W. 649.

lar purposes, and were divided into eleemosynary or charitable, formed to distribute the charity of their founders; and civil, which were for any other lay purpose.

3. In relation to the state authority, corporations are *public, quasi-public* and *private.*

Public corporations are such as are created for the purpose of government and the management of public affairs, as cities and villages, and banks and hospitals, founded by the state and managed by it for governmental purposes. Quasi-public corporations are really private corporations but on account of their public functions are subject to supervision by the state, a railroad company is an example of such a corporation. Private corporations are such as are created for private benefit of the members and which does not involve any peculiarly public purpose, as manufacturing, banking, etc.*

4. Civil corporations are again divided into *stock*

*It does not require very fundamental reasoning to discover that all corporations are really public or quasi-public, and that the state, by which we mean the whole people, are vitally interested in every one of them, whether formed to run a grocery store, refine oil, operate a railroad, or govern a city. Society has now become so complex, and the division of labor so complete, that the performance of every act towards, housing, feeding, clothing, supplying, amusing, as well as instructing, transporting and governing its various units becomes of importance to the state, or body politic, and must be supervised by the body politic, if not actually managed by it, if society is to be preserved from the monarchical inclined individuals and associations who delight to prey upon it.

and non-stock corporations, as regards the method of acquiring membership therein. In a stock corporation the ownership of stock or shares entitles such owner to membership. In non-stock corporations membership is acquired by election or complying with the corporate constitution or by-laws.

5. As to completeness of corporate existence, corporations are said to be *pure* and *perfect,* and *quasi* or *imperfect.* The first having all the powers of self-management incident to corporations at common law, and the latter having only a part of such powers; thus a municipal corporation is an illustration of the first, and a county or township of the latter.

6. As to the valility of corporate existence, corporations are classified as *de jure, de facto,* and by *estoppel.* A *de jure* corporation is one fully and perfectly organized in conformance to law, and whose right to exercise corporate powers is invulnerable by any one. A *de facto* corporation is one whose existence is invulnerable against any one except the state in a direct *quo warranto* proceeding. A corporation by *estoppel* is one which has no legal existence except as against some one who is estopped from denying its existence.

It is with the law pertaining to private corporations that we are now concerned.

Sec. 1208. AUTHORITIES ON LAW OF PRIVATE CORPORATIONS.—There are many writers on corporate law, some dealing with corporations generally, others with private corporations, and some with special features of corporate law only. Among the

earliest standard authorities may be mentioned Angell & Ames' work on Corporations, which has reached its 11th American edition. Morawetz's work on Private Corporations is a standard work and has been re-edited. Beach's Private Corporations is also a standard two volume work of recent date, other authors of books on corporations are Cook, Elliott, Clark, Field and Abbott. The subject of corporations is also ably presented in the second edition of the American and English Encyclopedia of Law, and there are numerous books giving leading cases on the law of corporations.

CHAPTER II.

CREATION OF CORPORATIONS.

Sec. 1208a. CREATION OF A CORPORATION IN GENERAL.—A corporation is created through the joint act of the state and individuals, usually designated incorporators or promoters. The promoters or incorporators apply to the state for the privilege of becoming incorporated themselves, or of forming a corporation out of other individuals, groups of individuals, or associations or corporations. Having secured permission these promoters provide for the organization of the corporation, which, when organized, puts an end to the functions of the promoters, and becomes a distinct entity. The members or subscribers to the stock contribute the capital, elect directors and officers and take general control of the corporate affairs; the management and operation of the corporation when fully organized devolves upon the directors and officers.

In the creation or institution of a corporation the following steps must be taken: 1. A grant of authority or charter must be obtained from the state or sovereign power. 2. The grant from the state must be accepted by the corporators. 3. An agreement between the corporators and the corporation.

Sec. 1209. THE STATE'S FUNCTIONS—POWER TO CREATE.—The power to create a cor-

poration is an incident of sovereignty, and so does not have to be conferred by constitutional provision.* And this sovereign consent is essential, no other power can rightfully create a corporation. None but the sovereign authority can create, and none but it can take away the franchise to be a corporation.

Sec. 1210. SAME SUBJECT—EVIDENCE OF THE SOVEREIGN'S CONSENT.—The consent of the state or sovereign may be evidenced in one of four ways:—1. By King's Charter. 2. By common law. 3. By prescription. 4. By legislative act. Thus Lord Coke says that the essentials of incorporation are,—persons to be incorporated; a name by which they are incorporated; of a certain place, and sufficient words, and while the words "incorporate," "found", "erect", or "create", are generally used, they are not imperative or essential, since any words that indicate an intention to create are sufficient.**

1. By King's Charter. In England under the common law, the usual method of creating a corporation was by king's charter, and this power still exists in the king, and is sometimes exercised, particularly in creating corporations for establishing colonies. But by the development of the powers of Parliament the king's prerogative became limited, and now the right to incorporate is usually given by Act of Parliament

*State v. Bradford, 32 Vt. 50; Bridge Co. v. Wood, 14 Ga. 80; 21 Pa. St. 9; McCullough v. Maryland, 4 Wheat. 316.

**River Tone v. Ash, 10 B. & C. 349; Bow v. Allenstown, 34 N. H. 351.

to which the king's consent is essential. The king is unable to create a corporation with a monopoly of the power of imprisonment, or jurisdiction contrary to the common law.* Private business corporations are now organized under the general law called the Companies Act of 1862, and since amended. Public service companies require a special act of parliament, and are incorporated only after investigation and report of their necessity.

2. Corporate Creation by Common Law. The state and the nation in their organized capacity, are themselves corporations; so, also, the king, the bishop, and executive officers generally, in their official capacity, are considered corporations sole, in England. They are not incorporated in the ordinary sense, but the common law holds these to be corporations so far as necessary to enable their functions to be performed without break, in case of death or removal; that is, the office or state endures, though the office holder dies, or according to the common law maxim, "the king never dies." Perhaps these are corporations by prescription.

3. Corporate Existence by Prescription. At common law when a corporation could show that it has exercised corporate powers for a long period of time, its right to be a corporation could not be questioned by any one except the state or king. The common law indulged the presumption that the proper charter

*1 Kyd on Corp. 61; The Companies Act, 25 & 26 Vict., c. 89; 1 Bl. Com. 474.

had once been granted but through the lapse or accidents of time had been lost. The corporation's right to exist was then said to be by prescription. In America, in the case of public corporations, the same presumptions are made, but it has been said that they will not be made in case of private corporations.*

4. Creation by Legislative Act. In England, as the king was the supreme executive, he was the holder of all the franchises of the commonwealth, and his consent, at least nominally, was essential to the creation of any corporation. In the United States, the legislative bodies are the custodians of the state's franchises, and hence no corporation can be created without legislative consent. This power inheres in our general legislative bodies, and is exclusive, and plenary as to time, place, method and purpose, unless limited by constitutional provisions, or by the nature of legislative power or franchise. The power cannot be delegated in the United States, under the maxim, *delegatus delegare non protest.***

Sec. 1211. SAME SUBJECT—FORM IN WHICH THE LEGISLATIVE AUTHORITY IS EXERCISED.—The legislative authority may be exercised in the following forms, when the constitution of the state does not prevent: 1. By special act. 2.

---

*1 Bl. Com. 473; Kyd on Corp. 40; Greene v. Dennis, 6 Conn. 293; 34 N. H. 351; Am. & Eng. Encyc. Law, (2nd ed.) Vol. 7 p. 646.

**Ex parte Burns, 1 Tenn. Ch. 83; State v. Armstrong, 3 Sneed, Tenn. 634.

By general act. 3. By implication. 4. By consolidation.

1. By Special Act. Until about 1840 this was the usual method of creating corporations in the United States, and to a great extent in England. The special act conferring a franchise or charter was usually enacted at the instigation and under the influence,—which might be good or bad,—of those who wished to become incorporated, and would have such powers and privileges as the whim or caprice of the promoters and the legislature dictated. Thus there were corporations of like kind and purpose with entirely different organizations and powers. The various special acts were enrolled as laws, and proved by duly exemplified copies.

2. By General Act.—The creation of corporations by general act is supposed to have been employed in Rome, but the first general law in England was in the time of Lord Coke, and provided for the erection of hospitals, and was not extended to other corporations. After the promulgation of the political views that all men were entitled to equal rights, and by reason of the great and manifest injustice of special acts, a popular demand for equal privileges and general laws as to the creating of corporation to prevent the legislative jobbery incident to the grant of franchise arose. It was proposed to have one general and uniform law for the creation of corporations, which any class of persons might use by complying with the requirements laid down. In 1793 such a general law, with easy

and simple requirements, was passed by Pennsylvania as to churches. Massachusetts provided such a law for manufacturing corporations in 1807. New York followed with a similar law in 1811, and by 1840 nearly every state had such a general law for one or all classes of corporations. In 1843 the state of Louisiana put in her Constitution that corporations should not be created by special act, but only under general laws; the other states have adopted similar provisions, so that at present almost every state has such a provision in its constitution. It is usual in these provisions to reserve to the state the right to amend or repeal any of these grants.*

3. By implication. Where rights and powers are granted to an association of persons, and there is no mode by which such rights and powers can be enjoyed or exercised without acting as a corporation, such an association is, by *implication,* held to be a corporation to the extent necessary to make such rights and powers available.

4. By Consolidation. The legislature by general law, or special act, where the state constitution does not forbid, may provide for the formation of one cor-

*It has been held that the general laws, and articles of incorporation adopted in pursuance of such general laws, constitute the charter of the corporation. Shoe Mfg. Co. v. Sheldon, 44 Neb. 279; Van Etten v. Eaton, 19 Mich. 187. Such general laws passed by the legislatures in pursuance of constitutional provisions are now too well settled to be attacked on the ground of unconstitutionality. Falconer v. Campbell, 2 McLean, (U. S.) 195; Bridge Co. v. Wood, 14 Ga. 80.

poration out of two or more existing corporatins, and this is known as *consolidation* or *amalgamation.*

Sec. 1212. SAME SUBJECT—LIMITS IN LEGISLATIVE AUTHORITY.—The limits upon legislative authority are such as arise: 1. From the nature of legislative authority. 2. From the nature of a franchise. 3. From constitutional limitations or provisions.

1. From the Nature of Legislative Authority. In the United States the legislatures are held to have delegated authority, and not original authority, and this delegated authority cannot be re-delegated to others, since it is regarded as a discretionary power, but this limitation does not prevent the passing of a general law providing for the creation of corporations by complying with the specific terms, and directing an executive officer to certify to the fact that compliance has been made. A real exception appears to exist, to this rule, in that Congress has the power to delegate to the territorial legislatures the power to create corporations.

2. From the Nature of the Franchise. It is against the liberty of the common law to thrust even a benefit upon an individual without his consent, so that the state is unable to incorporate into a private corporation any person who does not consent to be a member. But this rule does not apply to public or municipal corporations.

3. Constitutional Limitations. The constitutional limitations upon the power of the state and legisla-

tures to create corporations are to be found in the federal constitution and the state constitutions.

Sec. 1213. SAME SUBJECT—FEDERAL CONSTITUTIONAL RESTRICTIONS ON STATE LEGISLATURES.—There are no express limitations in the federal constitution, but there is the implied limitation that no state can create corporations and confer upon them such powers as would prevent the exercise of such exclusive or concurrent power as Congress has over the subject. And no state can create a corporation for a purpose that is expressly or impliedly prohibited by the constitution. (McCullough v. Maryland, 4 Wheat. 316.)

Sec. 1214. SAME SUBJECT—STATE CONSTITUTIONAL LIMITATIONS.—The most usual constitutional limitation is that the legislature shall pass "no special act creating corporations," or "conferring corporate powers" and requiring that they shall provide by general law for the creation of corporations, and that all such laws shall be subject to amendment or repeal.

By the weight of authority "creating corporations" and "conferring corporate powers" are equivalent ex-

*Southern Pac. R. Co. v. Orton, 6 Sawy. (U. S.) 157; Wiley v. Bluffton, 111 Ind. 152; State v. Railroad Co. 48 Mo. 468; Atty. Gen. v. Ins. Co. 82 N. Y. 172. Contra, State v. Cincinnati, 20 Ohio St. 18; McGregor v. Baylies, 19 Iowa, 43. The constitutions of Colorado, Illinois, and Nebraska, expressly forbid acts extending, altering, amending any charter or franchise already in force, with the exception of certain corporations of a public character.

pressions, although some cases hold that after a corporation is once created under a general law, other or special powers, can be conferred upon it by special act.* Such provisions do not, however, prevent the classification of corporations upon some reasonable basis, and the making of provisions for the creation of these different classes, with varying powers and functions for each class. A law which relates to a class of persons or things is *general;* while a law relating to particular persons or things in a class is *special.* Other constitutional provisions sometimes require that no law shall embrace more than one subject, and this shall be distinctly set forth in the title; others require the laws for the creation of corporations to receive a two-thirds or three-fourths vote of the legislature.

Sec. 1215. SAME SUBJECT—POWERS OF CONGRESS TO CREATE CORPORATIONS—The Federal Constitution neither expressly authorizes or forbids the formation of corporations, but from the time of the report of Alexander Hamilton upon the National Bank, and the decision in McCullough v. Maryland, (4 Wheat. 316) it has been established that Congress has, as incidental to its express powers, the power to create any corporation which it deems necessary or convenient in carrying out any of its great substantive powers. It can create a corporation as a *means,* but not as an *end.* Thus it can create a bank, a railroad, bridge, turnpike, telegraph and such like corporations,

to be located and operated in any of the states, either with or without the state's consent. Congress has now also exercised this incidental power to create a corporation for building a canal across the isthmus of Panama. By special provision, within the territories, and the District of Columbia, Congress has unlimited power, and hence unrestricted power, the same as legislatures, to create corporations. (Thomp. Corp. Sec. 682.)

Sec. 1216. SAME SUBJECT—POWERS OF TERRITORIAL LEGISLATURES.—The power to create corporations inheres in such bodies, subject to the control of Congress. By act of Congress it has been provided that corporations can be formed in the territories only under general laws, which are also subject to repeal or amendment by the territorial legislature or by Congress. When created, such corporations are not affected by the admission of the territory into the Union, and the adoption of a state constitution.*

Sec. 1217. THE PROMOTER'S FUNCTIONS—PROMOTERS DEFINED AND CLASSIFIED.—A promoter is a person, who, by whatever name he may be designated sets the machinery in motion, procures the subscriptions, directs the end, looks after the organization, prepares the prospectus, and negotiates the agreements necessary to the formation and crea-

*Vincennes University v. State of Indiana, 14 How. (U. S.) 268; 112 U. S. 414; Rev. Stat. U. S. Sec. 1889.

tion of a corporation. For convenience, they may be classified as: 1. Statutory, which may also be divided into *commissioners* under special acts and *incorporators* under general laws. 2. Self-constituted.

1. Commissioners. When corporations were formed under special acts it was customary to designate a part or all of the applicants, as commissioners to open books, receive subscriptions to stock, distribute the stock, call a meeting for organization, and superintend such meeting. When this preliminary work was accomplished the functions of the commissioners ceased; their functions were of a public discretionary character, and they were regarded as standing towards the corporation and subscribers as trustees. They were permitted to subscribe to the stock and exercise their discretion in making allotments of shares when there was an over subscription.

Incorporators. At present, under general laws, a certain number of persons are required to sign and file articles of incorporation; these persons are called *incorporators* or *corporators,* and are usually directed or permitted to call for subscriptions to the stock of the corporation to be formed, call an organization meeting of subscribers, act as inspectors of the first election, and certify who are elected, and appoint a time and place for the first directors' meeting. The functions of incorporators are about the same as commissioners under special acts. They may, or may not, subscribe for stock. Their functions cease as soon as

the organization is complete and the corporation launched.

2. Self-Constituted Promoters. It is not only the commissioners and incorporators that are permitted to organize corporations as promoters. Any one who actively undertakes any important step in the creation of a corporation is regarded as a promoter; thus a self-appointed person may introduce the enterprise to capital, indicate possible profits and secure the money to finance the corporation. In recent years the functions of such promoters have become important, especially in consolidating corporations. The steps usually taken by them are: 1. Securing options on the stock or property of the association or companies to be combined. 2. Financiering the new concern by securing the money necessary to complete the transaction and furnish working capital. 3. Organize the new company. As soon as options are obtained, a proposition is made to some financial house to *underwrite* the stock,—by which is meant, that the company agrees to take it until it can be unloaded on the public,—of the new corporation, to the extent necessary for completing the transaction; for this service the underwriters get a handsome commission in stock of the new company. As soon as such agreement is made the promoter secures the fewest possible persons necessary to incorporate, with the least possible amount of stock, but with authority to increase the amount of the stock to the sum desired. When the small amount of stock necessary to incorporate is

subscribed, the corporation is organized and officers elected, these then increase the stock as desired, authorize the issuing of all of it to the promoter, who, in consideration therefor, agrees to have conveyances of all the property or stock of the corporations, or companies upon which he holds options made to the new corporation; these conveyances are made, the promoter delivers the stock or cash to the old companies in payment, and then after paying the underwriter the allotted commissions, usually pockets the rest of the stock as his charges for floating a new concern and assisting in watering its stock.*

Sec. 1218. THE CORPORATE CHARTER, ITS GENERAL NATURE.—The conception of a corpor-

*The evil resulting from this combining and consolidation of corporations is easily discernible. If a farmer wishes to sell his farm or other property he has to take what it will bring from a purchaser who knows just what he is buying; but the system by which corporations can issue stock without limit against their holdings, regardless of their real value, and put the stock on the public market, and use a thousand and one schemes to unload it on an unsuspecting public, is little short of the confidence man's scheme. It is advocated that publicity of their affairs would remedy the evil, but if this is the remedy, why won't the same remedy apply to the evils of gambling and the like? The fact is, that if the state realizes the necessity of guarding certain individuals from the snares of others, more ambitious or designing, it certainly must follow that it is high time to take some effective steps to curb the piratical acts of trusts, and establish some safeguards for the people against the masked filchers, whose proceeds, swept up from a single well-managed combination amount to more than the earnings of all the gambling dens in a year.

ation consists in the offer and acceptance of a charter wherein are set forth the terms and conditions upon which the state will permit individuals or associations of individuals to exercise the franchise granted therein. It is both a *contract,* resulting from the offer and acceptance, or agreement; and a *law,* conferring the powers indicated. As a contract it is obligatory, binding both parties, and cannot be impaired by either without the consent of the other. As a law every person is bound to know its contents, under the maxim, that "ignorance of the law excuses no one." If general, the courts will take judicial notice of it; if special, it usually must be pleaded and proved. In its first instance, however, the charter or articles of association is a license for the persons named therein to convert themselves, or other persons, into a corporation by organizing in compliance with the rules and regulations indicated. As a contract, it is made up of an offer by the state and acceptance by the corporators, and if not accepted the offer will lapse.

Sec. 1219. SAME SUBJECT—OFFER AND ACCEPTANCE.—The offer of a charter may be made by the state to persons,—as is the case where incorporation is by general laws;—or by persons to the state, as where special agents secure the charters. Acceptance is necessary to the taking effect of the offer, but it need not be formal; and can be implied from acts, such as organizing and acting under it. But to be valid as against the state making the offer, unless otherwise expressly provided, the acceptance must be

within the state making it, by all to whom the offer was made, and unconditionally according to all its terms. Renewals, extensions, and amendments must be accepted in the same way.*

Sec. 1220. SAME SUBJECT—WHAT CONSTITUTES THE CHARTER.—When the charter was obtained from the king, or by special act of the legislature, the instrument or act comprised the charter, and set forth in detail the name, powers, method of acquiring membership, management, and other incidental matters showing the purpose and object of the corporation and the method of operating. When the incorporation is under general laws, articles of incorporation or association are required to be entered into and filed with some public officer; the charter in such cases consists of: 1. The provisions of the general law enacted by the legislature for the formation of corporations. 2. The articles of association as filed, which must be consistent with the general law.

1. Provisions of the General Law. The general law for the incorporation of private corporations enumerates the purpose or purposes for which corporations can be formed, contains provisions or restrictions as to number of incorporators provides for a name,

*Perkins v. Sanders, 56 Miss. 733; Atlanta v. Gas Light Co. 71 Ga. 106; Smith v. Mining Co. 20 Atl. 1032; State v. Dawson, 16 Ind. 40; Rex v. Westwood, 4 B. & C. 781; Bank v. Dandridge, 12 Wheat. 64; 80 Md. 278; Com. v. Cullen, 13 Pa. St. 133; Owen v. Purdy, 12 Ohio St. 73; Miller v. Ins Co. 92 Tenn. 167.

duration, amount of stock or debt, location of offices, number and qualification of directors and officers, liability of members, method of voting, notice of meetings, quorum, and the like. And also make provision as to the contents of the articles of incorporation. These provisions must be complied with.*

2. The Articles of Incorporation. The general laws usually require that those who wish to incorporate, frequently not less than five natural persons competent to contract, shall enter into written articles of incorporation, sign and acknowledge the same, as they would a deed, and file these articles with some specified public officer, who is to record the same, if it complies with the law, and furnish a certified copy thereof under the seal of the state to the applicants; this copy, so authenticated, is usually made *prima facie* evidence of the existence of the corporation. The general law usually requires these articles to set forth the name of the corporation, its purpose, location, duration, amount of stock, number of shares, officers, directors, and in some cases other matters. The articles must then be made to conform to the requirements of the general law, all inconsistent provisions being treated as surplusage and void, and usually cannot, even though claimed, secure any powers except such as are allowed by the general law. In New Jersey and Delaware, however, all powers claimed by the

*Atty. Gen. v. Hanchett, 42 Mich. 436; Reed v. Railway Co. 50 Ind. 342; State v. Relief Assoc. 29 Ohio St. 399; Corey v. Morrill, 61 Vt. 598.

incorporators in their articles are held to be created unless forbidden expressly by the general law. Under the first general incorporation law in England for the formation of hospitals, the corporation was created by a deed of settlement, setting forth the organization in the deed endowing the charity. This method is not customary in this country.

Sec. 1221. THE ASSOCIATION—ITS NECESSITY AND NATURE.—It follows from the fact that corporations aggregate being composed of more than one person, none of whom are obliged to accept membership in such an organization, that some association or agreement of a contractual character precedes, accompanies or results from the formation of a corporation; this agreement between the members need not be, though it usually is, a formal or written transaction, but sometimes it is very complex and intricate. In its general nature it is an agreement by each associate with his fellows, to organize for the purpose contemplated, and contribute his proportion of the funds agreed upon, the consideration for the agreement of each being the mutual promises of the parties. (I Mor. Priv. Corp. Sec. 24.) Other authorities claim that this relation is not so much an agreement between the subscribers or members, as it is an agreement between each subscriber and the corporate body. (Clark on Corp. p. 64.)

Sec. 1222. SAME SUBJECT—FORMS OF ASSOCIATION CONTRACTS.—The contract of association may take various form, but for conveni-

ence these may be classified as: 1. An exclusive statutory contract. 2. A common law agreement. These latter may be: (a) An agreement to subscribe for stock in the corporation to be formed. (b) An agreement subscribing for stock in a corporation to be formed, or after it is formed. (c) Subscriptions to promoters, agents, or trustees. (d) Underwriting contracts. (e) Application, allotment and notice. (f) Conditional subscriptions.

1. Statutory Contract. In some states where the statutes provide that articles of incorporation shall be filed, in which shall be stated the names of the incorporators, and the number of shares which each agrees to take, all who wish to become members must subscribe for the stock in the articles of incorporation, and no other method of subscribing will be valid. (16 N. Y. 451.) This view, however, seems to be confined to a few cases in New York and Missouri, under special statutes, and the general rule in other states is otherwise.

2. Common Law Agreement. (a) *Agreement to subscribe* for stock in a corporation to be formed. This contemplates a subscription upon the books of the company after they are opened, at some time in the future, it does not constitute the party so agreeing a member, nor can the corporation enforce the subscription. It constitutes an agreement between the parties that they will subscribe at some future time, and un-

til they do so subscribe it is no binding contract with the corporation.*

(b) Agreements *subscribing* for stock in a corporation to be formed. This differs materially from the agreement to subscribe just considered, yet there is much conflict of authority as to the legal effect of such an agreement, and four different theories exist: (i) That it is a mere offer, withdrawable at any time before the corporation is organized and accepts the offer; that death or insanity revokes it, and any one may withdraw upon giving notice to the person who took the subscription.** (ii) That it is an offer until acted upon in accordance with the provisions and then becomes a binding contract.*** (iii) That it is a binding contract from the time it is made.**** (iv) That it is an offer to a proposed corporation before its incor-

---

*Mor. Corp. Secs. 46, 49; Thrasher v. Pike County R. Co., 25 Ill. 393, where the contract was, "We, the undersigned, agree to subscribe to the stock of the Pike County Railroad the sums set against our names, when the books may be opened for subscription," it was held that the corporation could not maintain an action against the signers for a failure to subscribe when the books opened. Stowe v. Flagg, 72 Ill. 397; Mt. Sterling, Etc. v. Little, 14 Bush. (Ky.) 429. This principle has been questioned, and is perhaps modified to some extent. See, 85 Ky. 184; 27 Pa. St. 261.

**Fanning v. Insurance Co. 37 Ohio St. 339; Real Estate Co. v. Tower, 156 Mass. 82; Wallace v. Townsend, 43 Ohio St. 537; Auburn Etc. Works v. Schultz, 143 Pa. St. 256; 4 Tex. Civ. App. 224; 87 Mich. 182.

***156 Mass. 82; 161 Mass. 10; 140 Ill. 248; 116 Mass. 471.

****Minn. Threshing Machine Co. v. Davis, 40 Minn. 110; 14 N. Y. 336.

poration and acceptance, but a binding agreement between the subscribers from the time it is made.* The first view probably has the weight of authority. If the subscription is made to the stock of a corporation already formed, which accepts the subscription, the contract is binding from such acceptance by the corporation.

(c) Subscriptions to promoters, agents or trustees. When the subscription is made to a statutory promoter, as a commissioner or incorporator, it is a binding contract from the time of making; if made to a self-constituted trustee, who is to organize the corporation, and deliver certificates of stock to the subscribers, it is a binding contract between the promoter and subscriber, in accordance with its terms, from the time it is made; the trustee has a right to enforce it, if he performs his part, and when it is delivered to the corporation and accepted by it, the corporation can enforce it.

(d) Underwriting. Underwriting contract is a form of subscription entered into before subscriptions are called for from the public, whereby for an agreed commission or profit, the underwriter agrees to take all the shares except those which the public will subscribe for after the books are regularly opened and subscriptions solicited.

(e) Application, Allotment and Notice. Under the English law an application for shares is made to the promoters, very similar to our subscriptions for stock

*16 N. Y. 451; 16 Ind. 389; 124 Ind. 401.

in a corporation to be formed. After the subscription books are closed, the promoters make allotment of shares among those who have subscribed, either pro-rata, or in such way as the promoters deem for the best interests of the corporation. After the allotment is made the subscribers must each be notified of the number of shares allotted to him. The contract is not complete until after the allotment and notice, prior to that time it is a mere withdrawable offer.

(f) Conditional Subscriptions. Subscriptions to stock may be upon condition or conditions, which conditions may be: 1. Express or implied. 2. Precedent or subsequent. 3. Before or after incorporation. 4. Or the delivery of the subscription may be conditional.

Sec. 1223. SAME SUBJECT—CONDITIONAL SUBSCRIPTIONS.—1. EXPRESS AND IMPLIED CONDITIONS.—Express conditions may be found either in the subscription or in the statutes relating to subscription; the former may be of infinite variety, if not inconsistent with the charter. The most usual condition found in statutes is that requiring payment of a certain amount of subscription in cash at the time of making the subscription. When such subscription is made before incorporation two views are taken as to the necessity of payment under such a statute. One holding that it is obligatory, and failure to so pay makes the subscription void; the other holding that such provision is meant for the benefit of the corporation only, and that the corporation may waive

it if it chooses. The latter holding is supported by the weight of authority.*

The principal implied condition attaching to subscriptions at common law is that no one can be called upon to pay anything to the corporation for carrying on its business until the whole amount of the stock as agreed upon is fully subscribed. (91 Tenn. 44; 88 Mich. 62; 74 Wis. 226.)

Sec. 1224. SAME SUBJECT—CONDITIONAL SUBSCRIPTIONS PRIOR TO INCORPORATION.—Where subscriptions are necessary prior to organization, and they are made conditionally, or upon condition, two views are held in regard to them: By the New York holdings they are entirely void, and cannot be counted; while the Pennsylvania rule is that the condition annexed to the subscription is void, and the subscription absolute regardless of the condition, and to be counted as one of the necessary subscriptions. When such conditional subscriptions are not necessary for organization, they would probably be held valid according to their terms in either state.**

---

*"A conditional subscription to stock of a corporation is a subscription to take effect only on the fulfillment of a condition precedent. The subscriber does not become a shareholder, nor liable on his subscription, until the condition is substantially performed according to its terms. When it is so performed, the subscription become absolute and unconditional." Clark on Corp. Sec. 107.

**Troy & B. R. Co. v. Tibbitts, 18 Barb. (N. Y.) 297; Caley v. Railroad Co. 80 Pa. St. 363; Boyd v. Railway Co. 90 Pa. St. 169.

Sec. 1225. SAME SUBJECT—CONDITIONS PRECEDENT AND SUBSEQUENT.—A subscription upon condition precedent is one which requires the condition to be performed, unless waived, before the subscriber can become a member. If such a subscription is made after incorporation two theories prevail as to the legal effect of it: 1. That the subscription is a mere withdrawable offer until the condition is fully performed. 2. That it is a binding contract from time of making, to await the time of performance of the condition, and the subscriber cannot withdraw unless the corporation fails to perform.*

Subscriptions upon conditions subsequent are valid, and have the effect to make the subscriber a member from the time of acceptance by the corporation. If the corporation fails to perform the condition, the subscriber cannot withdraw, but has to rely upon his action for damages against the corporation for its failure to perform the condition. Courts will construe conditional subscriptions to be conditions subsequent if possible, rather than conditions precedent.

Sec. 1226. SAME SUBJECT—CONDITIONAL DELIVERY OF SUBSCRIPTION.—Subscriptions absolute in form, may be turned over to some one to be delivered to the corporation only upon the happening of some event; when this delivery is made to some

*That it is a withdrawable offer, see, Webb v. Railroad Co. 77 Md. 92; that the subscriber is bound by it and has to await performance, see, Armstrong v. Karshner, 47 Ohio St. 276.

one unconnected with the corporation it does not become effective until delivery to, and acceptance by the corporation; if delivered to an agent of the corporation one line of authorities holds that the legal effect is the same as if delivered to some outside party, while another line of authorities holds that it becomes absolute at once, and the condition is waived, on the ground that there can be no delivery in escrow to the other party or his agent. (40 Minn. 110.)

Sec. 1227. SAME SUBJECT—FRAUD AND MISTAKE AS AFFECTING SUBSCRIPTIONS.—Fraud and mistake vitiate any subscription into which they enter, in the same way, and to the same extent as in any other contract, and make it voidable at the option of the subscriber. He must, however, be diligent in discovering the fraud or mistake, and prompt in repudiating the subscription after ascertaining the fact. The English, and some American cases hold that even if the subscriber has acted with due diligence, he cannot repudiate the subscription after insolvency of the corporation, and the rights of creditors have intervened; other authorities hold that he can if he is not guilty of laches.*

*Fear v. Bartlett, 81 Md. 435; Ramsey v. Mfg. Co. 116 Mo. 313; Walker v. Railroad Co. 34 Miss. 245. That the fraud cannot be set up after insolvency, see, Turner v. Ins. Co. 65 Ga. 649; Ashley's case, L. R. 9 Eq. 263; 91 U. S. 45.

Mistake renders a contract absolutely void, but there are very few cases where it can be set up to defeat a subscription, and perhaps the only one is where the mistake is as to the nature of the transaction, and was induced by the deceit

Sec. 1228. SAME SUBJECT—PARTIES THAT MAY SUBSCRIBE.—The general rule is that subscribers must be persons capable of contracting so far as all subscriptions necessary for organization are concerned. An infant may subscribe, but if he does so he may repudiate the subscription as in other contracts. At common law, the subscription of a married woman was said to be void, but under statutes in most states her subscription is now valid. An alien friend, or non-resident, or person of any nationality or vocation may subscribe. Neither private or public corporations can subscribe for shares unless specially authorized. It is held that in the absence of constitutional provisions forbidding, the state or nation, by legislative permission, may subscribe for stock.

Sec. 1229. ORGANIZATION—IN GENERAL.—Under a charter granted from the king, or special act of the legislature, or by deed of settlement, the organization was distinctly set forth in the instrument itself, and usually the persons who were to act as first officers were therein designated, methods of continuing the succession were also specifically provided. Under general incorporation laws it is usual for the corporation to be completed before the articles of incorporation are filed, by electing the proper officers and agents,

---

or fault of the corporation or some third person, and was such as ordinary diligence could not guard against. Mistake as to the advantages to be gained by the incorporation cannot be set up to defeat a subscription; neither can a mistake of law. (Salem Etc. v. Ropes, 9 Pick. 187; 1 Mor. Corp. Sec. 97.

who make certificate of the fact when the articles are filed with the public officer, usually the secretary of state. In other cases after the subscriptions have been received, the incorporators call the subscribers together and they elect officers, adopt by-laws and take the other initial steps to start the corporate machinery. In some states more formal proceedings are essential, such as having a hearing before a court or commission established for the purpose.

Sec. 1230. SAME SUBJECT—PROOF OF ORGANIZATION.—Usually, under general laws, a certified copy of the articles of association filed with the secretary of state, duly certified by him under the great seal of the state, is prima facie evidence of the existence of the corporation; but it is not usually conclusive, and the fact of organization may be inquired into. Where the incorporation is by special Act, the Act itself, or an exemplified copy, with evidence of user was sufficient to establish the fact of corporate existence. So general reputation has been held to be sufficient.

Sec. 1231. SAME SUBJECT—COMMENCEMENT OF CORPORATE EXISTENCE.—As to the exact time of corporate birth there are divergent views, based largely upon peculiar provisions of the various statutes. These are: 1. There is no corporate life until organization is complete. 2. Corporate life begins as soon as proper articles of incorporation are filed with the prescribed officer, regardless of stock subscription or organization. 3. Only a qualified cor-

porate existence begins when the articles are filed, and adult, or perfect corporate capacity, is not acquired until the stock is subscribed for as required. 4. Corporate life begins as soon as articles are filed, but until the stock is divided into shares, the incorporators are tenants in common of the proposed capital. 5. Under special acts the statute may make those named therein, *ipso facto et eo instante* a corporation, without further act upon their part.

Sec. 1232. SAME SUBJECT—CONDITION OF *DE JURE* EXISTENCE.—A substantial, but not necessarily literal, compliance with all the mandatory conditions of the general law, is essential to *de jure* corporate existence, that is, to constitute an organization or incorporation which will prevail against even the direct assault of the state by *quo warranto* proceedings.

The implied condition that there must be good faith in seeking corporate powers is mandatory. The express mandatory conditions are: 1. That there shall be a certain number of incorporators. 2. Written articles of agreement or incorporation. 3. Usually requiring the names and residences of the subscribers to the stock. 4. The naming of the place of business. 5. The purpose or purposes of the corporation is usually required to be stated. 6. That the articles of association be subscribed. 7. Acknowledged. 8. Filed as required by law; all of these things have been held to be matters of which the state may complain if not substantially followed by the incorporators.

Sec. 1233. SAME SUBJECT—CONDITIONS OF *DE FACTO EXISTENCE*.—Something less than a substantial compliance with all mandatory provisions will suffice for the *de facto* existence of a corporation, that is, for an existence that is valid as against any one except the state. The conditions for de facto existence may be stated to be: a valid law under which such a corporation could be formed; a *bona-fide* attempt to organize under the law; an apparent compliance therewith; and corporate user. Where these things have occurred, by the weight of authority, no one but the state can successfully question the validity of the corporate existence.

Sec. 1234. SAME SUBJECT—CONDITIONS OF EXISTENCE BY ESTOPPEL.—All persons who have acted as if a corporation was in existence, and in such a manner as to recognize its existence, and whom it would be equitable to hold to such recognition, and inequitable not to do so,—will be estopped from denying the corporate existence, even though, as a matter of fact, it is neither a *de jure* or a *de facto* corporation. This is the rule established by the weight of authority, though there are many cases to the contrary. Another view is that there can be no estoppel upon a matter of law, and hence if there is no law, or an unconstitutional law for the corporation, there can be no corporate existence by estoppel. Still another view is that it is against public policy to allow persons to claim corporate existence, unless they have substantially complied with a valid law, and therefore refuse

to recognize the existence of a corporation by estoppel.

Sec. 1235. SAME SUBJECT—WHAT PARTIES WILL BE ESTOPPED?—Where the existence of a corporation by estoppel is recognized, the parties who will be estopped to deny its existence are: 1. The pretended corporation itself. 2. Those who act as, or claim to be, members, either among themselves, or in regard to their liability upon their subscriptions, or statutory liability to corporate creditors. 3. The promoters and officers of the apparent corporation. 4. Persons who have dealt with the apparent corporation in such a way as to recognize it to be such, either when they seek to avoid their liability to it, or to hold its members liable as partners. 5. Persons who have injured such corporation by their torts or crimes, when called to account by it.*

Sec. 1236. SAME SUBJECT—EFFECT OF FAILURE TO COMPLY WITH CONDITIONS.—The state may oust any corporation for failure to substantially comply with any mandatory condition by *quo warranto* proceedings. And if there is neither suf-

*Scheufler v. Grand Lodge, 45 Minn. 256; 47 N. W. 799; Perine v. Grand Lodge, 48 Minn. 82; Callender v. Railroad Co. 11 Ohio St. 516; Fitzpatrick v. Rutter, 160 Ill. 282; Bon Etc. Co. v. Ins. Co. 34 W. Va. 764; Wadesboro Cotton M. Co. v. Burns, 114 N. C. 353; Aultman v. Waddle, 40 Kans. 195; Chubb v. Upton, 95 U. S. 665; Eaton v. Aspinwall, 19 N. Y. 119; Ins. Co. v. Sherwood, 72 Mo. 461; Bushnell v. Machine Co. 138 Ill. 67; Bank v. Pfeiffer, 108 N. Y. 242; Hassinger v. Ammon, 160 Pa. St. 245.

ficient compliance on the part of the apparent corporation to form a *de jure* nor a *de facto* existence, any one not estopped for other reasons, can attack the validity of the pretended corporate existence in any proceeding in which it is of any importance to such person to have it determined. If there is a *de facto* existence, except as against the state, the powers, rights, duties and liabilities of the corporation and its members are the same as if *de jure*. So, where there is neither *de jure* or *de facto* existence, as to any one otherwise estopped by his own acts from denying it, the apparent corporation is to such person as it would be if it had a *de jure* existence. While to one not so estopped, the members, if it is a business corporation, may be treated as partners, or at least hold them liable as members of an unincorporated association.*

---

*Atty. Gen. v. Hanchett, 42 Mich. 436 State v. Relief Assoc. 29 Ohio St. 399; People v. Selfridge, 52 Cal. 331; North v. State, 107 Ind. 356; 97 Ind. 365; 16 Ind. 275; 26 N. Y. 75; People v. Board, 111 Ill. 171; Pape v. Bank, 20 Kans. 440; Bank v. McDonald, 130 Mass. 264.

CHAPTER III.

THE BODY CORPORATE.

Sec. 1237. MEMBERS—THEIR NECESSITY.—In a corporation aggregate there must be members, otherwise the corporation cannot exist. If it is a non-stock company the death of all the members terminates its existence, while if it is a stock company, the representatives of deceased members who succeed to the shares become members, and consequently the corporation is perpetually renewed, or has the faculty of "perpetual succession."* A practice has grown up whereby a corporation purchases and retires its own shares of stock. When that is done to the extent that all the shares are retired it would seem that the corporation having no stock, and hence no members, would be dissolved; but no case has yet been decided in this regard.

Sec. 1238. SAME SUBJECT—ACQUISITION OF MEMBERSHIP.—Membership in non-stock companies is obtained by complying with the conditions set forth in the constitution and by-laws. In stock corporations membership is acquired through owner-

*By reason of this faculty corporations are called "immortal," but their immortality is thus limited; usually they are limited by the act creating them to a certain term of years, and when this is not the case they may forfeit their right to existence and be dissolved by the state, and the term therefore does not mean that the corporation may continue forever, but that it may, unless voluntarily surrendered.

ship of stock, and this may be: 1. By subscription to the stock and acceptance by the corporation. 2. By a completed transfer of shares. 3. By estoppel in some cases, as by acting as a member without having in fact subscribed.

Sec. 1239. INTEGRAL PARTS.—In some cases a corporation is composed of two groups of individuals in such a way that the continuance of both is essential to the continued corporate existence. In such a case, if from any cause, all of one group should die, and there was no method of supplying their place, the corporation would necessarily be dissolved. It was once contended that the directors were such an integral part, but the cases have held otherwise. It is not usual to find a corporation so created.

Sec. 1240. ORGANS OF ACTION.—Since a corporation is an artificial entity, it can act only through its representatives. These are: 1. The majority of a quorum of corporate members duly assembled in corporate meeting. 2. A majority of directors duly assembled in directors' meeting. 3. Officers of the corporation, who are considered parts of the organization; or agents, who are not part of the organization, but who represent it as any agent represents his principal. 5. Servants, who do not represent the corporation, but simply work for it.

Sec. 1241. SAME SUBJECT—QUALIFICATION OF AGENTS AND OFFICERS.—Unless the state statute or charter prevents, a corporation may select

any person it pleases to be its officers, agents or servants. But it is usual to require directors to be shareholders, and in some states they are required to be citizens of the United States.

Sec. 1242. SAME SUBJECT—FUNCTIONS OF SHAREHOLDERS AND DIRECTORS. — Shareholders in a corporation wield extraordinary and unusual power, such as electing directors, accepting and rejecting amendments, increasing and reducing capital stock, making by-laws, admitting members, and under some circumstances removing officers, restraining *ultra vires* transactions, disposing of corporate property, winding up corporate business, and surrendering corporate franchises.

The directors control the ordinary business affairs of the corporation, such as the policy of its affairs, its entering into contract, selecting inferior officers, fixing their compensation, directing their action, etc. Within this scope of their authority, if they act in good faith, the stockholders cannot dictate to them or control their acts in any particular. If the directors keep within their authority the stockholders must wait until it is time for a new election and then select such directors as will shape the policy and management of the corporation in accordance with their wishes.

Sec. 1243. SAME SUBJECT—FUNCTIONS OF THE OTHER OFFICERS.—The *President,* merely as president, presides over corporate meetings and has no greater power in managing the corporate business than any other shareholder, but by statute, or charter

or by-law, or by a course of action acquiesced in by all, he is usually given the power to represent the corporation in most of its ordinary business transactions. He usually executes conveyances, signs contracts and certificates of stock.

The *Vice President* performs the duties of the president when the president is unable to do so.

The *Secretary* keeps the minutes, records of corporate meetings, and has no other duties unless others are specially conferred upon him. He is usually made the custodian of the corporate seal, and required to affix and attest it to all documents executed by the corporation. He frequently is allowed to issue shares, and is made the transfer agent of the corporation.

The *Treasurer* is custodian of the corporate funds, and has power to endorse checks for collection for the corporation. He is sometimes said to have implied authority to draw checks or bills of exchange, or sign promissory notes for money borrowed by the corporation, but it is questionable if he can do so without special authority.

Sec. 1244. INTERNAL RELATIONS OF THE CORPORATION ARISING FROM THE CONTRACTS CONTAINED IN OR RESULTING FROM THE CHARTER.—In 1769 the king of England incorporated twelve persons under the name of Trustees of Dartmouth College, and granted to them and their successors the usual corporate powers, and also the power to fill up any vacancies which might happen in their own body. In 1816, the legislature of

the state of New Hampshire attempted to amend this charter by increasing the number of trustees to twenty-one, the nine additional members to be appointed by the Governor, and also by putting over the trustees a board of overseers with power to inspect and control the most important acts of the trustees. The corporation refused to accept the amendment, and the case which resulted was carried to the Supreme Court of the United States, where it was held that the charter constituted a contract between the king (originally), and after the Revolution, between the state of New Hampshire and the corporation, which contract was of the same nature as any contract, the obligation of which could not be impaired by the state of New Hampshire without violating the federal constitution in the provision declaring that "no state shall pass any law impairing the obligation of contracts." From this case, Trustees of Dartmouth College v. Woodward, has sprung up a great body of corporation law, involving many far-reaching and important principles. Thus, resulting from this case it has been held that in the formation of a corporation the following contracts are created: 1. A contract between the state and the corporation. 2. A contract between the state and corporate creditors; and between stockholders and corporate creditors, where special statutory liability of stockholders is provided. 3. A contract between the state and the corporators or members. 4. A contract between the corporation and the members, or among the members themselves as to the amount to be con-

tributed, or that subscriptions are made in good faith. All these contracts, whether express or implied, are protected by the constitutional provision just referred to.

Sec. 1245. CORPORATE FUNDS, THEIR GENERAL PURPOSE AND DESIGNATION. — In every case of incorporation for business purposes there is a dedication of certain funds by the implied and express consent of the state and corporators to the attainment of certain purposes in a certain way. Because the state believes the purpose or purposes desirable it authorizes and sanctions the peculiar method of managing the business; because the corporators deem the method necessary or advantageous and the purpose profitable, they contribute the funds to establish the enterprise. The peculiar method consists in the state authorizing a changing body of persons, through a specified form of organization and under a designated name, to act and be considered as one person, or entity, in whom is vested the funds, and upon whom is placed the duty of applying them to the purposes named. These funds of the corporation are designated its *capital,* or *capital stock.*

Sec. 1246. SAME SUBJECT—CAPITAL AND CAPITAL STOCK.—There is much confusion in the use of these terms. By the best usage it may be said that the *capital* of a corporation is the whole amount of its property of whatever kind; and that *capital stock* is the amount which it has, or is authorized to

obtain by way of subscription. This latter is the sum fixed by the corporate charter as the amount paid in, or to be paid in by the subscribers for the prosecution of the business and for the benefit of corporate creditors.

Sec. 1247. SAME SUBJECT—PURPOSE OF CAPITAL STOCK.—The chief purpose of requiring a fixed capital stock arises from the fact that so long as a corporation acts within the scope of its corporate powers it does not cast any liability upon its officers, or anyone else, since it alone becomes responsible for its acts. So that the purpose or policy of requiring a capital stock, is to be security and indemnity for persons who become its creditors.* The state confers upon the incorporators privileges, as a franchise, or right to make contracts in an artificial name without fastening liability on any natural person, and it exacts from them, as a condition on which it grants this franchise, that they place a capital stock in safe pledge for the security of their creditors. This is a permanent investment with no power in a share-

*In a few states in addition to the capital stock the shareholders or members are made liable to corporate creditors in an amount equal to the capital stock which each holds, constituting what is called the double liability of stockholders. It is to be lamented that many states, including Ohio, have seen fit to change this double liability and establish the single security of the capital stock of the corporation, which so often proves no security whatever, as the incorporators if at all shrewd usually manage, by mortgaging the corporate property, and by selling watered stock, to get out of the concern far more than they ever put into it.

holder to withdraw it until the corporation is wound up and all its debts paid, and with no power in the managing board to permit it to be withdrawn at the expense of creditors. It is looked upon as a trust fund for the benefit of the corporation and the protection of corporate interests.*

Sec. 1248. SAME SUBJECT—CAPITAL STOCK AND SHARES OF STOCK DISTINGUISHED.—Capital stock and shares of stock are to be distinguished, as they are different things. The capital is the money or property or both of the corporation. The shareholders' shares are representative of the capital, the surplus, the franchises, and the good will of the concern. The capital stock of the company is owned and held by the company in its corporate capacity and character; while the capital stock of the shareholders

*This is the theory of the law, and sounds all right but how is it in practice? Does the capital stock protect creditors? Is it held as a trust fund for the benefit of those dealing with the corporation? And, if so, how is it that so many corporations so easily escape all responsibility for their obligation? Every day, almost, some favored institution, to whom the state or nation has given a most valuable franchise to operate a bank or business without individual liability, and which ought to be compelled to safeguard its patrons, fails, and it is found that there is absolutely no redress for those who have been the victims of misplaced confidence. It is to be hoped that the sovereign people who stand back of the state and legislature will soon demand of these favored institutions some adequate security, whether by double stockholders' liability, insurance, bondsmen or a *competent* system of government inspection and supervision, that the law may be vindicated and business be placed upon a sound footing.

is owned by them as individuals in varying proportions according to their subscriptions or purchases—that is, the one is regarded as belonging to the corporation, the other to the corporators or members. While the nominal or par value of the capital stock and the share stock are the same, the actual value is often widely different. The capital stock and surplus differ also. Neither the capital or capital stock can be divided or distributed, but the surplus may be. So that it may be said that the property of a corporation consists in three things, its capital stock, its surplus and its franchise, and these three things, distinct in the ownership of the company, are united in the ownership of the shareholders.*

*The *capital stock* of a corporation is the amount in money or property subscribed and paid in, or secured to be paid in, by the shareholders, and always remains the same unless changed by legislative authority. Although sometimes confused with the term "capital," it is not the same thing, importing not the value of the property of the company, but simply the amount of capital prescribed to be contributed at the outset by the stockholders for the purposes of the corporation. (State v. Fire Assoc., 23 N. J. Law, 195.)

The *capital* of a corporation includes all the property of a corporation, and may therefore be of greater value than the capital stock.

Shares of stock are said to be "intangible, and rest in abstract legal contemplation." (Burrall v. Railroad Co. 75 N. Y. 211, 217.) While they are said to be owned by the individuals as such, it means only that the owner of the shares has a right through their ownership to share in the profits of the corporation, and in its property after dissolution and payment of debts, in proportion as the number of his shares is to the whole number of shares comprising the capital stock. Burrall v. Railroad Co., *supra.* The shares of stock are not

Sec. 1249. SAME SUBJECT — KINDS OF SHARES.—Shares of stock are of various kinds, such as *common, preferred, guaranteed, interest-bearing, special, treasury, deferred, founder's shares, watered, fictitious* and spurious. These will be briefly explained.

Common Stock. Shares of common stock entitle their owners to an equal proportional participation in the management, profits, and surplus or assets in case of dissolution.

Preferred Stock. Preferred shares entitle the owners to some preference in the distribution of profits, or of assets, over the owners of the common stock. Such shares may be either cumulative or non-cumulative as to profits up to a certain fixed amount; if cumulative, a deficiency in paying the profits for any one year must be made up out of the profits of succeeding years before common stock is entitled to receive profits. In the absence of preferred stock being expressly made cumulative, it will still be held to be so. Preferred shareholders have a right to participate in the management and are subject to liabilities as other shareholders.

---

a chattel interest, and the holders do not own the property of the corporation; they are in the nature of a chose in action, or claim against the corporate property after dissolution and the satisfaction of liabilities. They are personal property, regardless of the fact that the corporation property is all or chiefly real estate. On the death of the shareholder the hares are to be distributed as personal property. Fisher v. Pank, 5 Gray, 373; Slaymaker v. Bank, 10 Pa. St. 373; Humble v. Mitchell, 11 Ad. & E. 205; Boardman v. Cutter, 128 Mass. 388.

Guaranteed Stock. Guaranteed shares in the United States, now mean substantially the same as cumulative preferred shares.

Interest Bearing Stock. Interest bearing shares are such as bear interest upon all sums paid in until the corporation is completed and profits earned out of which to pay dividends. Such payment, however, is held to be illegal as against creditors who might be injured thereby.

Special Stock. This is a peculiar kind of stock provided by law in Massachusetts, and limited to two-fifths of the actual amount of capital of the corporation, subject to redemption at a certain time, and drawing interest at a fixed rate, and without liability of the holder beyond the amount subscribed.

Treasury Stock. By treasury stock is meant that part of the authorized capital left in the possession of the corporation, to be issued in the future by the corporation, or upon further subscription. The term is also used to designate stock that has once been issued but surrendered or forfeited to the corporation, and afterwards re-issued by it. It cannot be voted nor does it draw dividends.

Deferred Stock. This stock draws no dividends until some other class of shares receive their dividends.

Founder's Shares. These entitle the holder to all the profits after certain fixed maximum dividends are paid to the other shareholders.

Watered Stock. By watered stock is meant stock which on its face purports to have been paid for at its

full value, but which in fact has been issued without the corporation having anything back of it for which to demand the full face value.

Fictitious Stock. By this is meant practically the same as watered stock or shares.

Spurious Stock. When stock is issued in excess of the amount authorized, it is spurious, or void, and the holder of such stock does not become a member of the corporation.

Sec. 1250. SAME SUBJECT—RIGHT TO CREATE A CAPITAL STOCK A FRANCHISE.—The right or power to create, increase, or decrease capital stock is a franchise which can be exercised only under the authority of the legislature. At the time a corporation is organized, however, it may then provide for both common and preferred stock and call for subscriptions for either. While if the corporation is first created and the stock subscribed upon the understanding that only common stock shall be issued, by the weight of authority the corporation cannot create shares that shall have a preference over the common shares. By express legislative authority, however, it has been held that the majority of members contrary to the wishes of the minority may issue preferred shares. This power to issue preferred shares is said to be analogous to borrowing money, and the majority unquestionably have the right to do that if done in good faith.

Sec. 1251. SAME SUBJECT — NATURE OF SHARES OF STOCK.—A share of stock in a corpo-

ration is an intangible property right, entitling the owner of the share to participate in the profits of the corporation, and in the event of dissolution to share pro-rata in the division of assets after the debts are paid. Shares of stock are personal property, goods, wares and merchandises within the 17th section of the statute of frauds, and choses in action. They are not negotiable instruments, and at common law could not be taken by attachment or on execution, because of their incorporeal nature. They are usually considered as being located at the domicile of their owner, though the state may give them a situs at the domicile of the corporation. They are evidenced by a certificate which usually says, "This is to certify that A. B. is the owner of ten shares (or any specified number) of the capital stock of the X Company, of the par value of $100.00 each, fully paid up, and transferrable only upon the books of the company upon the surrender of this certificate duly endorsed." This certificate is usually signed by the president, and countersigned by the secretary, under the seal of the corporation. Upon the back is usually the form of an assignment which may read, "For value received, I hereby assign and transfer all my right, title and interest to the shares in the X Corporation, evidenced by this certificate, to Y. Z., and I do hereby appoint C. to be my agent or attorney in fact, for me, and in my name to have the transfer of the same made upon the books of the company." This assignment will be signed by A. B. and delivered to Y. Z. Though it is not necessary to fill

in the name of the purchaser, nor the name of the attorney to make the transfer, these may be left blank, and after the delivery of the certificate to Y. Z., the purchaser, he may, by mere delivery of the certificate, sell it to some one else, and this person to another, and so on, and the last purchaser may fill in his own name and the name of some person to make the transfer on the books of the corporation, surrender the certificate, have the transfer made to him upon the books, and receive a new certificate in his own name.

Sec. 1252. THE CORPORATE NAME — ITS NECESSITY.—It was said in the early history of corporations, and is the rule yet, that; "The names of corporations are given of necessity, for the name is, as it were, the very being of the constitution; for, though it is the will of the king that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts; for it is nobody to plead and be impleaded, to take and to give, until it hath gotten a name."*

Sec. 1253. SAME SUBJECT—ACQUISITION OF A NAME.—A name is usually given in the charter or articles of association, and the law now usually requires it to be so given, but it is not perhaps indispensable that it should be so given, as it may be de-

*2 Bac. Abr. tit. "Corporations," c. 1; Conservators of the River Tone v. Ash, 10 B. & C. 349; Reg. v. Registrar, 10 Q. B. 839; Thomas v. Dakin, 22 Wend. 9; Ins. Co. v. Mass. 10 Wall. 566.

rived from usage. The corporation has the right at the outset to choose any name it may see fit, except perhaps that it cannot choose a name already in use by another corporation.*

Sec. 1254. SAME SUBJECT—RIGHTS IN THE CORPORATE NAME. — When lawfully acquired, the right to a corporate name is a franchise, and a name so acquired is protected as a right in a trademark; its subsequent appropriation by anyone else may be enjoined if the use or appropriation is to the damage of the original acquirer of the name. It has been held, however, that a foreign corporation cannot prevent the use of a corporate name afterwards selected by a domestic corporation, and that no exclusive right can be acquired in the use of geographical names. The secretary of state or other proper registering officer, has discretionary power to refuse to register a company that chooses a name identical or closely resembling one already in use.**

Sec. 1255. SAME SUBJECT—EFFECT OF MISNOMER.—The misnaming of a corporation in the case of contracts is of no effect if the identity of the corporation can still be established. In the case of legal process or summons issued against a corporation by the wrong name, the suit is not validly begun, but

*State v. McGrath, 92 Mo. 355; Elgin Butter Co. v. Elgin Creamery Co. 155 Ill. 127; Ill. Watch Case Co. v. Pearson, 140 Ill. 423.

**State v. McGrath, supra; Holmes, Booth and Haydens v. H. B. and Atwood Mfg. Co. 37 Conn. 278; Rogers v. Rogers, 17 C. C. A. 579, 70 Fed. 1017.

the error may be corrected by amendment. If the corporation issues process for itself in a wrong name it is ground for plea in abatement, though slight variation, not misleading as to the identity of a corporation, is not usually material.

Sec. 1256. SAME SUBJECT—HOW THE CORPORATE NAME MAY BE CHANGED.—The corporate name can be changed only by consent of the state and of the shareholders. Such change, if legal, does not affect the rights, duties or liabilities of the corporation. It has been held, however, if the change is illegal, members consenting thereto are liable as partners thereafter.

Sec. 1257. THE CORPORATE LIFE—MEANING OF PERPETUAL SUCCESSION.—In the absence of any provision to the contrary, the duration of a corporation is, or may be, perpetual. It is usual by constitutional or statutory provision to fix a limit to the corporate life. Some statutes require a limit to be fixed in the articles of incorporation. Within the time fixed, however, the corporation is said to have perpetual succession, by which is meant the power to provide other members in the place of those who drop out. In the case of non-stock companies, this is usually done by the election of other members, while in stock corporations, the successor in the ownership of stock becomes a member.

Sec. 1258. SAME SUBJECT — CORPORATE ACTION TAKEN IN SHAREHOLDERS' MEETING.—So far as the members control corporate ac-

tion, they must do so in a duly called corporate meeting. This meeting must be called by the proper officers,—in the absence of other provisions the directors have this authority,—though it is usual to put such authority in the hands of the president or secretary. Regular meetings of shareholders are also usually provided for in the by-laws, the time and place of holding same being therein designated.

Sec. 1259. SAME SUBJECT—NOTICE OF SHAREHOLDERS' MEETING.—At the common law notice of corporate meetings, definite as to day, hour, and place, had to be given personally to each shareholder in order to make the meeting valid. In the absence of charter, by-law or statutory provision this is still the rule of summoning the members to a corporate meeting. The matter, however, is usually regulated by the charter or by-laws, which usually allow notice to be given by publication or through the mail. If the meeting is a special one, or the business to be transacted extraordinary in character, the notice must state what the business to be done is. No further notice is necessary of an adjourned meeting, or the business to be done thereat, than the record of the resolution adjourning the meeting, after the time and place is fixed.

Sec. 1260. SAME SUBJECT—WHAT WILL CONSTITUTE A QUORUM.—At common law if all of an indefinite number of shareholders were duly notified to meet to take corporate action, those who assembled pursuant to the notice constituted a quo-

rum; but by charter, by-law or statutory provision it is now usually required that a majority of the shares outstanding be represented at the meeting in order to constitute a quorum. It is held that members may vote by proxy, and by this method it seems that one member holding the proxies of enough shareholders to make a majority of the shares, may by himself hold a corporate meeting and elect the officers, provided the meeting was duly called. This is frequently done by corporations organized in New Jersey.

Sec. 1261. SAME SUBJECT — PLACE OF MEETING.—In order to make a valid meeting against shareholders who do not attend, the meeting must be held within the state creating the corporation. But those who do not attend will be estopped from denying the validity of the action taken. A corporation formed by the consolidation of two corporations created in different states, may hold a shareholders' meeting in either state.

Sec. 1262. SAME SUBJECT — DIRECTORS' MEETING.—The directors must also act in a duly called meeting. They have no authority to bind the corporation by their individual acts done outside the corporate meeting. The rules as to notice of their meetings are the same as in the case of shareholders. In the absence of a provision to the contrary, the quorum of the directors' meeting is a majority of the directors. The directors vote as individuals and not according to the shares represented by them, and they cannot vote by proxy. Being agents of the corpora-

tion, there is no necessity for them to meet within the state, as is the case with shareholders. Exercising delegated powers themselves, it is usual to say that they cannot, without special authority, delegate their discretionary duties to an executive committee. There are many cases, however, to the contrary.

Sec. 1263. SAME SUBJECT—HOW CORPORATE CONTRACTS SHOULD BE EXECUTED. —The contracts of a corporation should be made in the corporate name. Conveyances of land should be to the corporation in its corporate name, and likewise, the conveyances of the corporation should purport to be granted and executed by the corporation in its corporate name. Notes by the corporation should be signed by the corporate name, and notes payable to it should be made to it in the corporate name.

Sec. 1264. DISSOLUTION OF CORPORATIONS—METHODS OF DISSOLUTION. — A corporation may be dissolved in the following ways:— 1. By the expiration of the time mentioned in the charter. 2. By the happening of a condition or contingency prescribed by the charter to have that effect. 3. By the death of all the members in the case of non-stock corporations,—but as in the case of a stock corporation, the shares of the deceased members are distributed as personal property, the successors in ownership becoming members, the corporate life is not affected. 4. By loss of an integral part, where the corporation consists of integral parts, without the power to replace such loss. 5. By a surrender of the corpo-

rate franchise, and its acceptance by the state. It is said that acceptance by the state is essential to dissolution, but this is customarily provided for now, by general law prescribing a method whereby the surrender may be effected. Mere non-user or insolvency of the corporation is not alone a dissolution. 6. By repeal of the corporate charter by the legislature when the state has reserved such power. 7. By the forfeiture of the corporate franchise by a proceeding in the courts for that purpose, because of non-user, misuser, or other act in violation of the franchise granted.

Sec. 1265. SAME SUBJECT—ONE MAN COMPANIES.—In the case of stock corporations there is usually nothing to prevent one member from acquiring all the shares of stock. By the weight of authority, if the corporation was validly created, the fact that one person acquires all the stock in good faith has no legal effect upon the continued corporate existence. However the stock is owned, if the action is in the corporate name, and through the corporate officers, it is corporate action. And, on the other hand, the individual acts of the sole owner does not bind the corporation, though the individual owner himself might be estopped to deny that such action was in effect corporate action. In Maryland and Kentucky, it has been held that the ownership of stock by one person virtually suspends corporate existence during such sole ownership.

Sec. 1266. SAME SUBJECT—EFFECT OF DISSOLUTION. — The effects of dissolution are:—1.

Franchises can no longer be exercised. 2. As to executory contracts, involuntary dissolution at common law extinguished such contracts, and no damages could be recovered for non-performance. In Equity, and by statute in most cases, the obligation of such contracts survives, and may be enforced against the corporate assets, and it is said that voluntary dissolution does not extinguish such contracts. 3. As to debts; at common law debts due to or from the corporation were extinguished, but now such claims are preserved in equity, and generally at law by statute. 4. As to personal property; at common law, this at dissolution vested in the crown or state, but now it is preserved as an asset for the payment of creditors, or distribution among the shareholders after the debts are paid. 5. As to real property; this at common law, reverted to the grantor, but now a corporation whose duration is limited may take or grant an estate in fee, so that upon dissolution all land then belonging to the corporation becomes assets for the payment of debts, and then for distribution among the shareholders, there being no reversion either to the grantor or to the state in the case of private business corporations. In eleemosynary and non-business corporations, the common law doctrines of the escheating of personal property to the state, and the reversion of real property to the grantor, are applied. 6. As to actions at law by a corporation; at the common law, suits or actions by a corporation, abate upon its dissolution; but by statute such a result is now prevented, by al-

lowing the representatives of the defunct corporation to continue the actions in its place. At the common law no valid judgment could be rendered against a dissolved corporation, and attachment and garnishment proceedings were terminated by a dissolution. Statutes now usually provide that dissolution shall not abate pending suits, nor prevent the bringing of suits against the defunct corporation. Upon dissolution, either by voluntary surrender of the charter, by repeal, or by forfeiture, statutes usually provide either that the corporation shall itself continue to exist for a certain time in order to wind up its affairs, or that a receiver shall be appointed for such purpose.

CHAPTER IV.

CORPORATE POWERS AND LIABILITIES.

Sec. 1267. POWERS IN GENERAL.—THEORIES OF CORPORATE CAPACITY.—There are two general theories of corporate capacity, though the one may be said to be rather an exception to the other theory than a rule in and of itself. These are: 1. The theory that a corporation has only special capacity—that is, that it has such powers, and only such, as are expressly granted or necessarily implied from those granted, all other powers being excluded. 2. General capacity, by which is meant the doctrine that a corporation once duly created has all the powers and capacities of a natural person, so far as they can be exercised by an artificial person. While the rule of special capacities is almost universally adhered to in this country, there is a tendency in the decisions of the state courts, where no public interest or policy is specially involved, and creditors' rights are not affected, to allow a corporation practically a general power to do almost everything and in every way an individual could do it, within the field covered by the business engaged in by the corporation.*

Sec. 1268. CLASSIFICATION OF CORPORATE POWERS.—Corporate powers are of three

*Thomas v. Railroad Co. 101 U. S. 71; Byrne v. Mfg. Co. 65 Com. 336; Downing v. Road Co. 40 N. H. 230; Ashbury, Etc. Co. v. Riche, L. R. 9 Exch. 224; 9 Exch. 84.

kinds or classes: 1. Incidental. 2. Express. 3. Implied. The incidental powers are such as are annexed tacitly without any express words to any corporation duly created. They include; the power to have perpetual succession for the period designated; to have a corporate name, and to contract, grant, receive, sue and be sued therein; to purchase and hold personal and real property necessary to the enterprise; to have and use a corporate seal; to make by-laws; and to remove members or officers under some circumstances. (2 Kent, Com. 277,-8.)

2. Express powers are such as are specifically enumerated in the charter or general law, and constitutionally granted therein, together with such as are lawfully inserted in the articles of incorporation.

3. Implied powers are such as are reasonably necessary or proper for the execution of the powers expressly granted, and not expressly or impliedly excluded. In this connection, necessary does not mean indispensable, but does include that which is convenient and usual in carrying out the express powers.

Sec. 1269. SAME SUBJECT — GENERAL RULES FOR THE CONSTRUING OF CORPORATE CHARTERS.—These are: 1. The legislative intention is to be ascertained, if possible, and given full effect. 2. The language used is to be construed neither strictly nor liberally, but according to its fair import. 3. Words are to be given their ordinary meaning unless custom or usage has given them a different one. 4. The whole law is to be considered, but

the enumeration of certain powers, by implication, excludes all other unnecessary powers.*

5. When the question is one between the state and the corporation, or when the public interest is involved, a strict construction against the corporation, and in favor of the state will be applied. And if the charter is silent about a power it does not exist; and where the language used is susceptible of two meanings, that construction is to be adopted which will work the least harm to the state.**

Sec. 1270. PARTICULAR POWERS—POWER TO CONTRACT.—The validity of corporate contracts may be determined by investigating as to three essential things; these are: 1. Did the corporation have power to make the contract in question? 2. Was it made by an authorized agent? 3. Was it made in the proper form?

Sec. 1271. SAME SUBJECT — POWER TO CONTRACT DEBTS AND BORROW MONEY.—A corporation may contract debts to any extent for its corporate purposes that its credit will allow, unless statutes expressly forbid. Statutes frequently fix the limit as to the amount that may be borrowed, and in such case one who has loaned money to the corpora-

*Shoe Mfg. Co. v. Sheldon, 44 Neb. 279; State v. Payne, 129 Mo. 468; Black v. Canal Co. 24 N. J. Eq. 474; Bank v. Billings, 4 Pet. 514; Bank v. Baldwin, 23 Minn. 198; Case v. Kelley, 133 U. S. 21; Talmadge v. Pell, 7 N. Y. 328.

**Stourbridge Canal Co. v. Wheeley, 2 B. & A. 792; Ross-Meehan Etc. Co. v. Iron Co. 72 Fed. 957; Whitaker v. Canal Co. 87 Pa. St. 34.

tion in excess of the fixed limit cannot recover the excess; but one who in good faith loans money after the corporation had already borrowed up to the limit can recover if he had no knowledge of the fact. It has been held that a corporation cannot borrow money for the purpose of purchasing its own shares.

Sec. 1272. SAME SUBJECT—POWER TO ISSUE NEGOTIABLE INSTRUMENTS. — Whenever it is a necessary or convenient method of conducting their proper business, corporations, through agents having express or implied authority to bind the corporation, have the power to issue any form of negotiable instruments. But they have no power unless expressly authorized to deal in notes or bonds. If a corporation has power to issue a promissory note for any purpose, a *bona-fide* holder for value, having no knowledge of want of authority of the agent or of other irregularity, or that it was issued for an *ultra vires* purpose, will be protected.

Sec. 1273. SAME SUBJECT—POWER TO ISSUE ACCOMMODATION PAPER.—There is no implied power to issue or indorse negotiable instruments for the mere accommodation of an outside party; but if it is done by a corporation having authority to issue promissory notes, a *bona-fide* purchaser without knowledge of the fact will be protected.

Sec. 1274. SAME SUBJECT—POWER TO BE SURETY OR GUARANTOR.—Corporations have no implied power to become sureties or guarantors,

though it has been held that if all the shareholders agree, and *bona-fide* creditors' rights are unaffected, the guaranty will be binding. There are also well-defined exceptions to the general rule; for example, a corporation holding the securities of another party has the right to dispose of them, and guarantee their payment in the ordinary course of business; so also a railway company may guarantee the payment of bonds and interest of a company whose road it is authorized to lease.

Sec. 1275. SAME SUBJECT — POWER TO FORM PARTNERSHIPS.—The general rule is that a corporation has no power to form a partnership unless expressly authorized; the reason being, that it would necessarily give to some one outside of the corporation, as the other partners, a power of management over the corporation, which would be inconsistent with its duty to the state. Of course, the corporation may be expressly authorized to enter into a partnership, and in California it has been held that if the management was left entirely to the corporation, it might be a partner.

Sec. 1276. SAME SUBJECT—POWER TO ENTER INTO TRADE COMBINATIONS.—In regard to pools between connecting lines of railroads, where a division of earnings is made for through traffic, if the rates established are not unreasonable, such transactions have been considered valid. But if they are established between competing lines, and for the purpose of preventing competition, they are *prima*

facie invalid. Though in New England and New Hampshire they have been held valid if the rates agreed upon were not unreasonable. The United States Anti-Trust Act of 1890 forbids pooling between competing lines, whether the rates fixed by the pooling combination are reasonable or unreasonable, and in a late case this Act has been upheld and such a combination or pooling of interest between competing roads prevented.

Other trade combinations which restrain trade and competition, or which restrain or prevent a corporation from controlling itself through the officers provided in the organization of the company, are void, for two reasons: 1. All contracts in restraint of trade, with some exceptions, are void and uninforceable, whether made between individuals, partnerships, or corporations. 2. Because corporate authority is a franchise granted by the state for a definite purpose to be exercised in the way prescribed, and subject to forfeiture by the state if it is not carried out in accordance with the grant. So that if the corporation abdicates its power to manage itself, by becoming a member of such a combination, the state may, by *quo warranto,* proceed to take away its charter. Such contracts to combine, at common law, were not criminal or tortious, but merely uninforcible. The federal government, by act of Congress, as to inter-state and foreign commerce, and most of the states, have by their anti-trust acts made such combinations both tortious and criminal, so that those who may become members

are subject to a penalty in favor of the state, and liable to damages to the one injured thereby.

Sec. 1277. SAME SUBJECT—POWER TO FORM UNINCORPORATED TRUSTS. — The original form of a trust combination was for the shareholders of a corporation to place their shares in the hands of trustees to be voted by them and receive from the trustees, trust certificates instead of their shares; the duties of the trustees, in a general way, were stated in a deed of trust, enabling the trustees through their ownership of the stock and power to vote it, to control all of the corporations whose shareholders had so placed their stock in trust. Such transactions, when for the purpose of creating a monopoly, have been held illegal and void.

Sec. 1278. SAME SUBJECT—INCORPORATED TRUSTS.—Another form of combination or trust is obtained by one corporation purchasing the shares of other corporations, and issuing its own shares in payment thereof. This enables the shareholders of any number of corporations in effect to combine their interests in such a way as to confer the sole power of management of all of them in the hands of one corporation. In Illinois, where corporations may be formed for any lawful purpose, it was held that a corporation formed for a purpose of this kind, which practically resulted in a monopoly of the gas business of Chicago, was illegal and void, and could be dissolved by the state, although apparently there was a perfect compliance with the provisions of the law. New

Jersey, on the other hand, holds that courts have no authority to declare such a corporation illegal, so long as the state legislature has not expressly made them illegal.

Sec. 1279. SAME SUBJECT — POWER TO CONSOLIDATE. — By consolidation is meant a merger, union, or amalgamation, by which the stock of two or more corporations is made one; their property and franchises combined into one; their names merged, and their powers combined so that practically one new corporation results. Consent of the state and consent of the shareholders are essential to any consolidation. By the weight of authority, under a reserve power to alter or amend the charter, the majority of the members may consent to a consolidation against the wishes of the minority; if the state has not reserved the power to amend, unanimous consent of the members is necessary.

By such consolidation the old companies are usually dissolved, their property becomes that of the new company, but their liabilities continue against the old companies, although they are also usually enforceable against the new company. Lands of the consolidating companies vest by virtue of consolidation in the new company without further conveyance. As a rule the contract rights of the old companies pass to the new, and it must perform the contract duties of the old companies. The new company is liable for the debts of the old companies to the extent of property received from them, and if expressly assumed,

to their full extent; it is usually held liable for the torts of the old companies also. In inter-state consolidation, the new company is held to exist as a new company in each state, with the powers, rights, and franchises that the constituent company had in that state, but not those that belonged to the companies created in another state.

Sec. 1280. SAME SUBJECT—POWER TO HOLD AND ACQUIRE REAL PROPERTY.—At the common law, it has been said, a corporation had the power to acquire real property to an unlimited extent, but in this country it is generally held that corporations have the right to purchase and hold only such real property as is necessary or convenient to carry out their legitimate purposes. If a conveyance of real estate to the corporation is executed, none but the state can afterwards complain, and it can only do so in a *quo warranto* proceeding to forfeit charter, unless some statute authorizes the conveyance to be set aside, or the land escheated to the state. If the conveyance is not completed an interested party may object in any suit by the corporation to perfect its title; and a court of equity will not decree a specific performance of a contract to convey land which the corporation has no authority to hold. A corporation may take any estate in land except an estate in joint tenancy, or such as dower, courtesy, or tenancy in tail, etc. A grant of a freehold to a corporation without words of inheritance or succession, will pass a fee

to a corporation aggregate, and this is so though the life of the corporation is limited.

Sec. 1281. SAME SUBJECT—POWER TO TAKE BY DEVISE.—Corporations were expressly excepted in the English statute of Wills, and consequently lands could not be devised to them. But in this country, in the absence of a special statute to the contrary, they are capable of taking a devise of land for any purpose necessary in carrying on their business. In some of the states there is a limit set as to the amount which may be devised to them. In New York it is held that a devise in excess of this fixed amount is void as to the excess, and the next of kin or residuary heirs or legatees may claim such excess; by the weight of authority, however, it is held that only the state can complain of the lack of authority to take such devises, as in other matters.

Sec. 1282. SAME SUBJECT—POWER TO ACQUIRE PERSONAL PROPERTY.—It is the general rule that a corporation can only acquire such personal property, both as to amount and kind, as is reasonably necessary for the corporate purposes; but there is no limit to the amount of personal property that may be acquired by a corporation through the profits made in carrying on the corporate enterprise.

Sec. 1283. SAME SUBJECT—POWER TO ACQUIRE ITS OWN SHARES.—In the United States by the weight of authority, perhaps, a corporation is allowed to purchase its own shares, so long as

the security of creditors is not impaired thereby. There is no doubt that it may do so in order to prevent loss to the company. In England, however, and in many of the states, the rule is otherwise.

Sec. 1284. SAME SUBJECT—POWER TO ACQUIRE STOCK IN OTHER CORPORATIONS.—It is the general rule in the United States that one business corporation has no general implied authority to acquire or hold stock in another such corporation, organized either for a similar or a different purpose, as an investment, for speculation, or for the purpose of controlling or managing such corporation. The English rule is to the contrary, and this is followed in some American cases. When it is necessary to prevent loss, or secure the payment of a debt, such stock may be taken; and it is held that a parent company may acquire the stock of a branch company. So likewise, it is said, that authority to consolidate, implies a power to purchase the stock of the company with which the consolidation is to be made.

Sec. 1285. SAME SUBJECT—POWER TO ALIENATE PROPERTY.—In the ordinary course of business corporations have full power to sell or dispose of their property if creditors, dissenting shareholders and the public are not injuriously affected thereby. If the corporation is a failing one, the majority may, against the consent of the minority, dispose of all its property, for the purpose of closing out its business and paying creditors, but not in other

cases. Such property as is charged with a public trust, or which is essential to the performance of the duties the corporation owes to the public, cannot be sold so as to prevent the performance of such duties. The corporate franchise cannot be disposed of without special authority, and when that is given, the theory is, the sale of it is in effect a surrender to the state, and a re-granting of it by the state to the purchaser, who takes it subject to the provisions of the law as they exist at the time of the purchase. The power to mortgage is co-extensive with the power to sell.

Sec. 1286. SAME SUBJECT—POWER TO ACT IN A PERSONAL RELATION.—A corporation may take property that it has power to own in trust, and administer the trust according to its terms. In some states it is held that a corporation may be an executor, administrator, or guardian, and now they are frequently authorized to assume such personal relations by statute. They also may be an agent or attorney in fact.

Sec. 1287. SAME SUBJECT—RIGHT TO SUE.—At common law a corporation has the right to sue anywhere it can find the defendant and serve him with process. In this country the states may impose restrictions, and exclude foreign corporations from sueing in the state courts except as to matters involving inter-state or foreign commerce; but no state can exclude a foreign corporation from sueing

in the federal courts. Federal corporations also have the right to sue in the federal courts.

Sec. 1288. SAME SUBJECT—SUITS AGAINST CORPORATIONS.—For the purposes of being sued in the United States courts, as well as bringing suits, a corporation is conclusively presumed to be a citizen of the state, and an inhabitant of the district, in which it is incorporated. Alien corporations, that is, such as are formed under foreign governments, may be sued in the federal courts in the district wherein they may be found doing business. Corporations of other states may be sued in any state where they may be found doing business, if proper service of process can be made upon them. It has been held that a corporation will be considered as doing business within a state, when a traveling salesman is within the state taking orders for its goods, and that service of process may be made upon him in suits arising out of business done with the corporation through him. It is usual to say that the corporation must be engaged in business in the state, and that the agent stands in some representative character to the company in order to make the service of process valid, and judgment thereon effective against the corporation. Service upon an officer of the corporation temporarily within the state is not usually sufficient.*

*Bank of Augusta v. Earle, 13 Pet. 519; Livery Co. v. Watson, 10 Mass. 91; Henriques v. West India Co., 2 Ld. Raym. 1532; St. Clair v. Cox, 106 U. S. 350; Lafayette Ins. Co. v.

Sec. 1289. SAME SUBJECT — PLEADING CORPORATE EXISTENCE.—The courts are in conflict as to the necessity of alleging corporate existence; one line of authorities holding that the plaintiff corporation must always allege itself to be such, while another line holds exactly the contrary. Again, one line of authorities holds that in a suit against the corporation, the plaintiff must allege that the defendant is a corporation; while others hold just the reverse. So, also, one line of authorities hold that pleading the general issue, or a general denial, raises the question of corporate existence; others hold that it does not.

Sec. 1290. SAME SUBJECT—THE RIGHT TO HAVE A SEAL.—At common law it was the general rule that a corporation could contract only under its corporate seal. But the rule is now otherwise, and a corporation is not required to contract under its corporate seal in any other case than an individual would be required to do so. Signing is now generally held of more importance than sealing, although at common law sealing without signing was sufficient. Any device adopted by the corporation as a seal will be sufficient. If the seal alone is present it must be proved to be the corporate seal. When a contract is shown to have been executed by

French, 18 How. 404; Emerson v. Machine Co. 51 Mich. 5; Wilson v. Fire Alarm Co. 149 Mass. 24; Gibbs v. Ins. Co. 63 N. Y. 114; Newell v. Railway Co. 19 Mich. 336; Hiller v. Railroad Co. 70 N. Y. 223.

the proper officer, with authority, any seal will be presumed to be the corporate seal. The presence of the corporate seal is *prima facie* evidence of the agent's authority, and the regularity of the corporation's action. The seal is also said to be evidence of a valid and sufficient consideration, but it does not now exclude inquiry into those matters.. The presence of the corporate seal on negotiable instruments does not destroy their negotiability.

Sec. 1291. SAME SUBJECT — CORPORATION'S POWER TO MAKE BY-LAWS.—A by-law signifies a regulation adopted by the corporation in regard to the relation of shareholders and officers to the corporation, or prescribing the functions of officers, the times and places of corporate meetings, etc. The power to make by-laws is incidental to corporate existence, and resides in the shareholders, unless otherwise provided. This authority may be conferred upon the directors. In the absence of special statutory authority, there is no power to make a by-law providing for the forfeiture of shares for non-payment, or to prevent the transfer of shares, or to create a lien upon shares that will be effective against transferees without notice, or for the expulsion of members in a corporation having a capital stock.

In general, to be valid, by-laws must be reasonable; conform to the charter and state statute and the common law; and must operate uniformly and not be in restraint of trade. They cannot modify vested rights, change terms as to dividends, increase or de-

crease liability of shareholders, or enlarge the corporate powers. Members, but not third parties, are presumed to have notice of their provisions.*

Sec. 1292. CONCERNING THE DOCTRINE OF *ULTRA VIRES* — MEANING OF THE TERM.—*Ultra vires* literally means beyond the power. In its application to corporation law it means beyond the authority of the corporation; thus, though the corporation may have the *power* to do an act, yet if it has not the rightful authority to do it, such act, if done, is *ultra vires*. When there is no authority to do an act, there is no authority to ratify it, even if all the shareholders should consent. There are several theories as to the effect of an *ultra vires* act; thus, by some authorities such acts are held void absolutely, while others regard them as voidable only. The reason for holding *ultra vires* acts of a corporation void or voidable are chiefly: 1. The interest of the public requires that the corporation shall not be allowed to transcend the powers granted. 2. The interests of the shareholders require that the capital shall not be subjected to risks in enterprises not contemplated by the charter. 3. The obligation rests

*Flint v. Pierce, 99 Mass. 68; Cahill v. Ins. Co. 2 Doug. (Mich.) 124; Sutton's Hospital Case, 10 Coke, 23a; Haven v. Asylum, 13 N. H. 532; Burden v. Burden, 40 N. Y. Supp. 499; Brewster v. Hartley, 37 Cal. 15; State v. Overton, 24 N. J. Law 435; Matthews v. Associated Press, 136 N. Y. 333; Kent v. Mining Co. 78 N. Y. 159; Budd v. Multnomah St. Ry. Co. 15 Or. 413; People v. Young Men's Soc. 41 Mich. 67; Driscoll v. Mfg. Co. 59 N. Y. 96; Presbyterian Etc. Fund v. Allen, 106 Ind. 593; Rathbun v. Snow, 123 N. Y. 343.

upon every one contracting with a corporation to take notice of the legal limitations upon its powers. The doctrine of *ultra vires* is now confined almost exclusively to contracts, and is not applied in the law of torts to excuse negligent actions.*

Sec. 1293. SAME SUBJECT—AS TO EXECUTED CONTRACTS.—As a general rule, *ultra vires* contracts, when fully executed by both parties, will not be disturbed upon complaint of either party; the court will leave the parties as it finds them. Thus one who has sold, received payment for, and conveyed land to a corporation, cannot sue to rescind the conveyance on the ground that the corporation had no power to purchase; nor can the corporation rescind the purchase and recover what had been paid.**

---

*For cases holding an *ultra vires* act void, see, Franklin Co. v. Lewiston, Etc. 68 Me. 43; Bank v. Jones, 95 N. Y. 115; Davis v. Railroad Co. 131 Mass. 258; Thomas v. Railroad Co. 101 U. S. 71; Miller v. Ins. Co. 92 Tenn. 107; Ry. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371.

For cases holding them voidable, see; Whitney Arms Co. v. Barlow, 63 N. Y. 62; 127 N. Y. 252; Kadish v. Assoc. 151 Ill. 531; Day v. Buggy Co. 57 Mich. 151; 91 Mich. 351; Wright v. Hughes, 119 Ind. 324; Woolen Co. v. Lamb, 143 Mass. 420; Seymour v. Society, 54 Minn. 147. These cases hold that the *ultra vires* act of the corporation may not be so far contrary to public policy and illegal as to prevent an action being founded on it in any case, and that where it would be unjust to allow the plea of *ultra vires* to prevail for mere want of authority in the corporation to do the act, it may be disregarded.

**Long v. Railway Co. 91 Ala. 519.

Sec. 1294. SAME SUBJECT—EXECUTORY CONTRACTS.—*Ultra vires* contracts wholly executory, that is, not performed by either party, may be repudiated by either party to the contract. In fact, it is usually said to be the duty of either party to withdraw from it, and when this is done no action for breach will lie, and an equity court will not decree specific performance. (Nassau Bank v. Jones, 95 N. Y. 115.)

Sec. 1295. SAME SUBJECT—PARTIALLY EXECUTED CONTRACTS.—Where an *ultra vires* contract is only partially executed, there are two general views as to its legal effect. The rule maintained in England, in the Supreme Court of the United States, and in several states is, that such a contract is absolutely void as to its obligation and no action, in any form, can be maintained upon it. But, if the person who has performed his part, has parted with anything of value, this may be recovered of the other party in any form of action proper for such purpose, as for an accounting.*

The other view, held by the great majority of the state courts, is that the person who has not yet performed his part, but who accepts and retains any of the benefits received from the other party, is thereby estopped from denying the validity of the contract,

*Northwestern Union Packet Co. v. Shaw, 37 Wis. 655; Day v. Buggy Co. 57 Mich. 146; Davis v. Railroad Co. 131 Mass. 258; Bank v. Townsend, 139 U. S. 67; Brown v. Atchison, 39 Kans. 37; Moore v. Tanning Co. 60 Vt. 459.

and consequently it is enforceable according to its terms by the other party.*

Sec. 1296. SAME SUBJECT—WHO MAY COMPLAIN OF *ULTRA VIRES* CONTRACT.—Those who are entitled to complain against the enforcement or carrying out of an *ultra vires* contract entered into by a corporation, are: 1. The state, if the public is affected. 2. The parties, except as limited in the preceding sections. 3. Shareholders may enjoin the completion of an *ultra vires* contract which is executory, and in come cases may have an executed *ultra vires* contract set aside, if they act promptly. 4. Creditors of the corporation cannot usually complain, but where the *ultra vires* contract would, if performed, make the corporation insolvent, it has been held that a creditor can enjoin its performance. Outside parties, though they might be in some way affected by the *ultra vires* contract cannot enjoin its performance.

Sec. 1297. LIABILITY OF CORPORATIONS FOR TORTS AND CRIMES.—Corporations are held liable for torts substantially as the master is held liable for the torts of his servants while en-

*Nassau Bank v. Jones, 95 N. Y. 115; s. c. 1 Cumming, Cas. Priv. Corp. 293; Bissell v. Railroad Co. 22 N. Y. 259; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Bradley v. Ballard, 55 Ill. 413; Brewing Co. v. Flannery, 137 Ill. 309; Bank v. Co. 90 Mich. 550; Slater Woolen Co. v. Lamb, 143 Mass. 420; Wright v. Hughes, 119 Ind. 324; Wright v. Pipe Line Co. 101 Pa. St. 204; Seymour v. Soc. 54 Minn. 147; 66 N. H. 100; 58 Conn. 219.

gaged in the master's business. The managers of the corporation are regarded as being practically the corporation, since the whole of the corporate duties are vested in them. The corporation can only act through its representatives, and for their torts committed while acting in behalf of the corporation, the corporation is held responsible. Thus a corporation has been held liable for damages for an assault, battery, false imprisonment, libel, malicious prosecution, fraud, deceit, conspiracy, trespass, nuisance, negligence, etc., committed by its representatives while acting for it. It is said that a corporation is not liable for slander, because slander cannot be committed by an agent, but this does not appear logical or right. By the weight of authority a corporation is liable for torts arising from a business or act that is *ultra vires*. They are also liable for exemplary damages as masters are for the torts of their servants.

An exception to the rule of corporate liability for torts is made in the case of charitable corporations, such as, hospitals, and the like, as they receive no compensation for their service, it is held that their funds shall not be taken to pay damages for torts committed by their agents, and such agents are alone held liable for their torts.

CRIMES. Corporations are held liable for crimes, whether arising from non-feasance or misfeasance, and also for criminal libel. There seems to be no good reason why they might not also be held liable criminally, for many other offenses, even for felonies

of the higher grade, except that the criminal laws do not usually provide penalties that could be applied to them. There is a tendency to hold them liable for such crimes as may be punished by fines.

Corporations are liable for contempts of court as individuals are, and may be punished for contempt, by fines imposed upon them, as well as by imprisonment of their officers, where such officers refuse to obey the orders of the court.

CHAPTER V.

The Corporation and The State.

Sec. 1298. THE STATE'S MEANS OF CONTROL—IN GENERAL.—The state's general methods of controlling corporations are: 1. By the courts. 2. By or through the legislature.

1. By the Courts. The state by permitting actions at law and suits in equity, exercises general control over corporations as over other persons. The state may also exercise special control over corporations through the courts by way of visitation under special circumstances.

2. By Legislative Bodies. The general regulation of all persons, whether natural or artificial, within the state, inheres in Congress and the state legislature. And other special legislative powers or means of control are frequently reserved to the state when the corporation is created. The legislative power over corporations is limited by constitutional provisions to be found in both the national and state constitutions. These are:

Sec. 1299. SAME SUBJECT — CONSTITUTIONAL LIMITATIONS ON LEGISLATIVE CONTROL OF CORPORATIONS.—The limitations imposed by the national constitution upon Congress are: 1. All direct taxes shall be apportioned among the states according to population; and Congress is by this provision limited as to its power to tax

corporations. 2. Bills of attainder and *ex post facto* laws shall not be passed. 3. Taxes or duties shall not be laid upon articles exported from any state. 4. Preferences shall not be given to ports of one state over those of another. 5. Vessels shall not be obliged to enter, clear, or pay duties in passing from the ports of one state to another. Congress cannot in its effort to control corporations transgress any of these constitutional provisions.

The constitutional provisions limiting the state legislatures in their control of corporations, are: 1. No state shall pass bills of attainder, *ex post facto* laws, or laws impairing the obligation of a contract. 2. A state cannot lay imposts or duties on exports or imports, or any duty on tonnage. 3. It cannot abridge the privileges or immunities of citizens of the United States. 4. It cannot deprive any person of life, liberty or property without due process of law. 5. It cannot deny to any person within its jurisdiction the equal protection of the laws. The last three limitations are to be found in state constitutions as well as in the federal constitution.

Sec. 1300. THE STATE AND ITS OWN CORPORATIONS—CONTROL BY THE COURTS.—The state in the control of corporations created by it, through the courts, has five special methods available, which existed at common law, but are also usually authorized by statute. These are:

1. *Quo Warranto,* or an information in the nature of *quo warranto,* as it is now called. 2. *Scire facias.*

3. Mandamus. 4. Injunction. 5. Indictment. While it is usual for the Attorney General to start these proceedings, the court itself has authority to direct some one to bring them; and by statute in many states, the proceedings may be instituted on the relation of any individual.

1. *Quo Warranto.* The writ of *quo warranto* was issued to bring a corporation before the court to show "by what authority" it claimed or exercised corporate franchises, and was applicable to cases where there never had been a right, as well as where there had been a forfeiture of a previous right by reason of neglect or abuse. The same end is now accomplished, in a similar way, by an information in nature of *quo warranto.* The judgment was, and is, when the action is maintained, ouster and seizure of franchises.

2. *Scire Facias.* This is a common law writ generally used where there was a legal corporation which had abused its authority, and it was called upon by this writ "to make known" why it had done so. The judgment could be the same as in *quo warranto* proceedings.

3. Mandamus. The writ of mandamus may be issued to compel the performance of a definite corporate duty, whether fixed by statute, charter provision, or by the common law.

4. Injunction. This writ is issued by a court of equity to prevent the doing of some wrongful or injurious act threatened by the corporation.

5. Indictment. This is a criminal proceeding, and

may be used to punish a corporation for creating or maintaining a public nuisance, or other offense punishable by a fine.

Sec. 1301. SAME SUBJECT—FOR WHAT CAUSES FORFEITURE MAY BE HAD.—Any abuse, misuse, or non-user, of corporate franchises, to the injury of the public, is cause of forfeiture by the state in *quo warranto* or *scire facias* proceedings. Thus, engaging in unlawful combinations, in illegal insurance or banking, fraudulent organization, wilful or negligent non-user, and the like, are sufficient to constitute a forfeiture of charter. Also, the usurpation of any public franchise, imperfect or insufficient organization, exercising corporate powers after expiration of charter, or intrusion into a corporate office, will be causes of forfeiture.

Sec. 1302. SAME SUBJECT—FORFEITURE AS EFFECTED BY STATUTES OF LIMITATION AND WAIVER.—There is an English rule that the courts will not entertain a *quo warranto* on the relation of a private individual when six years have elapsed from the time the cause of forfeiture occurred, but this rule is not applicable to the king or state, since statutes of limitations do not run against the state, unless the state is expressly named. Many of the states have, however, provided that the state shall not bring *quo warranto* proceedings after a prescribed time, varying from eight to twenty years. The legislative body may, after a cause of forfeiture has occurred, waive the state's right to complain, and

the failure of the Attorney General to act has a similar, but not the same effect. A waiver by the legislature pardons the offense, and the state cannot afterwards forfeit the charter for that particular offense.

Sec. 1303. SAME SUBJECT—THE STATE'S POWER TO CONTROL BY MANDAMUS.—Mandamus is a prerogative writ which may be issued to compel the performance of a duty. Whenever a specific and determined legal duty is imposed upon a private corporation, expressly or impliedly, by statute, charter or common law, and there is no other adequate remedy for its enforcement, *mandamus* will lie in a suit brought on behalf of the state to enforce the public duty; or in case of a private right, on behalf of the person or persons to whom the duty is due, but it will not issue to enforce a mere optional corporate privilege, or to control discretion. It may be used to reinstate a member; compel the calling of meetings; the inspection of books; the transfer of shares; and to compel public service companies, as water, gas, telegraph, railroad, and the like companies, to perform their duties to the public, or to individuals.

Sec. 1304. SAME SUBJECT—CONTROL BY COURTS OF EQUITY.—Equity courts have no general jurisdiction to dissolve corporations, though it has been held in Michigan, that where dissolution was necessary to prevent the continuance of a fraud in a suit of which the court had jurisdiction, it could go to the extent of decreeing dissolution. And such

power under the like circumstances is frequently conferred upon equity courts by statute. Neither do courts of equity usually have power to enjoin corporate acts, unless there are other ground of jurisdiction. An injunction may be granted upon the application of the state whenever a corporation is abusing the powers given it for a public purpose, or is acting adversely to the public, or is creating a nuisance or threatening to do these things; it will likewise issue to prevent the dissipation of the funds of a public charitable trust when the beneficiaries are so numerous and indefinite that the trust can be preserved only through the public authorities. A shareholder may enjoin the violation of a corporate franchise, the diversion of funds, or the completion of executory *ultra vires* transactions.*

Sec. 1305. SAME SUBJECT—CONTROL BY PRIVATE AND PUBLIC VISITOR.—In the case of charitable corporations, the person who endowed

*Generally to entitle a stockholder to maintain a suit in equity to prevent a corporate injury from an act threatened, either in his own name, or on behalf of himself and other stockholders, it must be shown that every reasonable effort to obtain redress or protection through the regular corporate management has proved unavailing, thus the bill may show that the directors cannot sue by reason of their disqualification from misconduct, or have wrongfully refused to do so upon proper demand, and that there is no adequate remedy at law, and then the action may be maintained by the shareholder. Dodge v. Woolsey, 18 How. 331; Atwood v. Merryweather, L. R. 5 Eq. 464; Hawes v. City of Oakland, 104 U. S. 450; Miner v. Ice Co. 93 Mich. 97; Wayne Pike Co. v. Hammons, 129 Ind. 368.

the charity had the right or privilege of appointing a visitor to see if the funds were applied according to the terms of the gift, and if he did not appoint such visitor the right to do so resulted to himself and his heirs. But since in the United States the English primogeniture rules of descent have been abolished, and all of a person's children become heirs, such method of visitation becomes impracticable, though if the right is not waived, it yet remains; statutes, however, usually provide other methods of appointing visitors now.

Public Visitor. In most of the states, the legislature has provided for Railroad, Insurance and other like Commissioners, whose duty it is to inquire into and report upon the condition of various kinds of public service corporations, they are supposed to protect the public from slack methods on the part of the corporations.

Sec. 1306. SAME SUBJECT—CONTROL BY THE LEGISLATURE.—The control exercised by the state through the legislature is either: 1. Ordinary; or 2. Extraordinary. In the exercise of the ordinary legislative powers, corporations are subject to; (a) The power of *eminent domain.* (b) The *police power.* (c) The *taxing power.* In the exercise of the legislature's extraordinary powers, under some circumstances, corporate charters may be: (a) *Repealed;* (b) *Amended.*

Sec. 1307. SAME SUBJECT—(a) THE POWER OF EMINENT DOMAIN.—Corporations, like

natural persons, are subject to the power of the state to take any of their property or their franchises, for public purposes, upon making due compensation. The general rule is, however, that property already devoted to a public use cannot be taken for another public use without express authority; and it is sometimes said that the new use must be different from the old use, that is, one railroad company could not be authorized to take the whole line of another railroad company to be operated in the same way. The rule is not violated, however, by the taking of street railways operated by horses, for use by electric power companies; and the taking of toll roads by the state to be turned into free roads.*

Sec. 1308. SAME SUBJECT—(b) THE POLICE POWER.—Corporations are subject to the police power of the state the same as individuals. So, although they may have been chartered for the express purpose of carrying on a lottery, or manufacturing liquors, yet subsequent legislation may forbid such acts, without infringing the constitutional provisions as to the impairing the obligation of contracts, for the reason that no one can obtain a vested right in any business that is dangerous to the public health, the public morals, or the public safety. The

*Greenwood v. Freight Co. 105 U. S. 13; Railroad Co. v. Railroad Co. 111 Mass. 125; Turnpike Co. v. Railroad Co. 21 Vt. 590; Black v. Canal Co. 24 N. J. Eq. 455; Trustees of Canal v. Railroad Co. 14 Ill. 314; Bridge Co. v. Dix, 6 How. 507; 11 Pet. 420.

state cannot surrender or barter away its control over these subjects. Under the police power, also, the rates to be charged by public service companies, within the limit that forbids their being deprived of their property without due process of law, may be fixed or regulated; and reports from insurance, trust, building and loan, bank and other like companies may be required for the protection of the public. The general limits of this power is that in case of lawful business, property cannot be confiscated by the state, vested rights divested, or the performance of natural functions interfered with by the state in its legislation.*

Sec. 1309. SAME SUBJECT—(c) THE TAXING POWER.—The state's power to tax corporations is the same as in the case of individuals. The corporate elements of taxation are: 1. The primary franchise. 2. Secondary franchises. 3. Its property, real or personal, tangible or intangible. 4. Its capital stock, authorized, subscribed or paid in. 5. Earnings, gross or net, or profits. 6. The shares of

*Thorpe v. Railroad Co. 27 Vt. 140; Beer Co. v. Mass. 97 U. S. 25; Ward v. Farwell, 97 Ill. 593; Eagle Ins. Co. v. State, 153 U. S. 446; Railroad Co. v. Loomis, 13 Ill. 548; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Town of Lake View v. Cemetery Co. 70 Ill. 191; Com. v. Railroad Co. 103 Mass. 254; Chicago Railroad Co. v. People, 105 Ill. 657; People v. Railroad Co. 70 N. Y. 569; 77 Pa. St. 173; Atty. Gen. v. No. Am. Life Ins. Co. 82 N. Y. 172; Chicago Life Ins. Co. v. Needles, 113 U. S. 574; Munn v. Illinois, 94 U. S. 113; Stone v. Trust Co. 116 U. S. 307; Ruggles v. People, 91 Ill. 256. And see the subject of police power in Vol. 4 Home Law School Series.

stock owned by shareholders. It is possible that all of these might be taxed at one time without being illegal, though it would be in some sense double taxation, or treble or quadruple, as the case might be.

1.—2. Taxation of Franchises. It is not usual to separate the primary franchise,—the right to be a corporation and exercise corporate powers, from the secondary franchises, such as occupying the streets by a street railway corporation,—for the purposes of taxation. Some courts seem to think that since the state charges a very small or no fee for the privilege of incorporating, the primary franchise has no value; the proper view, however, seems to be that its value is whatever it adds to the convenience, efficiency, and safety of conducting the business by the corporate form of organization over other forms, that is, what would those who have it, give for it, rather than do without it. Its value is difficult to estimate, and many rules for its ascertainment have been suggested. Without attempting to separate the primary and secondary franchises, the following methods of valuation have been approved: First, find the market value of all the shares and bonds of the corporation, from this subtract the assessed value of all the real and personal property, the balance thus obtained will be the value of the franchises. Second, ascertain the total net earnings, usually the average earnings for a period of years, capitalize these at the average rate of interest upon short loans, from the total amount so found, subtract the assessed value of the real and

personal property, the balance will represent the value of the franchises. Both of these methods are based in fact upon the earning capacity of the capital of the corporation, and is the business man's estimate of its value.

The situs of secondary franchise,—such as the right to operate a street railway,—for the purpose of taxation, is where the line is operated. And the same is true as to railroad corporations. The situs of the *primary* franchise is usually considered as being at the principal office of the corporation; it undoubtedly can be, however, considered as having a situs wherever the corporation does business, in proportion to the business done; and it is usually so considered when business is done in two or more states. The franchise may be, but is not usually, unless specially named, included in the term "property", for purposes of taxation. Franchise taxes may be measured by dividends, by the amount of the capital stock, or the amount of capital stock employed within the state, by ascertaining the amount of the capital stock and deducting the value of the tangible property assessed in the state, by the extent of the business transacted, by the net earnings, by the aggregate market value of the shares, less the value of the real and personal property, by a percentage on the excess of the market value of the stock over the value of real estate and machinery.* But corporate franchises grant-

*Adams Ex. Co. v. Ohio, 165 U. S. 194; Telephone Co. v. Phila. 190 U. S. 160; Southern Gum Co. v. Laylin, 66 Ohio

ed by Congress are not taxable by state authority without the consent of Congress. (127 U. S. 1; 166 U. S. 150.)

3. Taxation of Property. The corporate property of whatever kind, is subject to taxation the same as that of individuals. There is a tendency now to consider the property as a unit devoted to a special purpose, and have all of it assessed by one state board, instead of by local assessors. After it is assessed by the state board, the apportionment may be, and frequently is, made among the various counties or local subdivisions of the state in proportion to the business done in these districts, or mileage therein, in the case of railroad and telegraph companies, and the like. And the same principle may be applied in the taxation of corporations doing business in several states.*

4. Taxation of Capital Stock. A corporation chartered by two states may be taxed on its capital stock in each. As the capital stock of a corporation is regarded as belonging to the corporation as a legal entity, it may be taxed to the corporation. But in some states certain corporations are relieved from paying

---

St. 578; People v. Ins. Co. 92 N. Y. 328; Com. v. Bank, 123 Mass. 493; People v. Roberts, 157 N. Y. 677; Sav. Soc. v. Coite, 6 Wall. 594; Com. v. Gas L. Co. 12 Allen, 75; Am. & Eng. Encyc. L. (2nd ed.) Vol. 27, p. 932.

*State Railroad Tax Cases, 92 U. S. 575; Pittsburg, Etc. R. Co. v. Backus, 154 U. S. 421; Cin. R. Co. v. Com. 81 Ky. 492; Pullman P. C. Co. v. Pennsylvania, 141 U. S. 18; Adams Express Co. v. Ohio, 165 U. S. 194; Postal T. Co. v. Adams, 155 U. S. 688.

taxes on their capital stock. When the capital stock is taxed under the principle of deriving an income or profit therefrom, it does not mean net profit, and the tax must be paid though there is no net profits derived.*

5. Taxation of Gross or Net Earnings. These may be the basis of taxation in the case of corporations not engaged in inter-state commerce, or upon those earnings that are not derived from such source, since this would constitute an interference with interstate commerce, which is under the exclusive jurisdiction of the federal government. And the states cannot directly tax corporations upon earnings derived from interstate commerce.** It has been held, however, that corporations may be taxed upon their capital stock, and the tax may be graded according to the gross or net earnings, whether they are partly derived from interstate commerce or not.***

6. Taxation of Shares of Stock. Shares of stock are taxable although the corporate property or capital stock is also taxed, and whether this is at its actual or face value. In several states it is held that this is not double taxation; in others it is held to be such.

---

*People v. Niagara Co. 4 Hill. (N. Y.) 20; 7 Hill. 504; People v. New York, 18 Wend. 605; Tennessee v. Whitworth, 117 U. S. 129; Com. v. Erie R. Co. 98 Pa. St. 127; R. Co. v. Weber, 96 Ill. 443.

**Phila. Steamship Co. v. Pennsylvania, 122 U. S. 326; Knisely v. Cotterel, 196 Pa. St. 614.

***Delaware Railroad Tax, 18 Wall. 206; State v. Co. 93 Md. 314.

The situs of shares of stock for the purpose of taxation is usually the domicile of the owner, but the state may make their situs to be that of the domicile of the corporation, and tax them there, even though their owner lives in another state where he is also taxed on the same shares. It has been held also that alien owners of shares may be taxed higher than residents, but this is not the case where the owner simply resides in another state of the Union. By statute they are usually made taxable as personal property.

The state cannot tax the franchise of a national corporation, without the consent of Congress, nor can it tax any national governmental agency; neither can it tax a patent right granted from the government, but it may tax the machines or property constructed under the patent.

Sec. 1310. SAME SUBJECT—POWER TO REPEAL AND FORFEIT.—These have already been referred to under dissolution. This power is extraordinary, and if it is not reserved to the legislature, it cannot repeal any charter; if the power to repeal is reserved without qualification, it may be exercised at any time without giving any reason for so doing. Vested property rights are not destroyed, however, by such repeal; if the power to repeal is reserved upon the happening of some condition, some cases hold that there must be a judicial determination that the condition has happened, before the legislature can act; other cases hold that the matter is wholly within the power of the legislature to determine.

No reserve power is necessary for forfeiting the corporate franchises for abuse or non-user; this power is implied from the nature of a franchise, and can be enforced only in the courts after a proper judicial determination of the facts. A court of law alone has the power to dissolve for breach of duty, and generally only on complaint of the state, by the Attorney General.

Sec. 1311. SAME SUBJECT—POWER TO AMEND.—Since a charter is a contract, the general rule here is that it can be amended only by consent of both parties, that is, the state and the corporation; and further, since there is also contained in the charter, a contract between the corporation and each member, the corporation cannot accept an amendment unless each member consents; and this is the general rule in this country concerning material amendments, where the state has not reserved the power to amend. Under the transcendent power of Parliament, however, a material amendment could be imposed upon a corporation without its consent or that of its members; and the corporation could be destroyed by Parliament at any time, as the constitutional provision which governs our legislatures, as to impairing the obligation of contracts, has no place in the English constitution. Perhaps Congress has a like arbitrary power as to corporations created by it.

Under a reserved power to amend, the states have much the same power as Parliament — that is, an amendment, even though material, may be tendered

and if not accepted the state may take away the corporate life. But in this connection it has been held that what the state offers must be an *amendment,* not something wholly new and different,—such as requiring a banking company to build a railroad.

Two views are taken also as to the power of the majority of the members to accept an amendment, if the power to amend is reserved to the state when the corporation is formed. One line of cases holds, that the majority have the power to accept material amendments, against the dissent of the minority; other cases hold that unanimous consent is necessary.

Sec. 1312. THE STATE AND NATIONAL CORPORATIONS—IN GENERAL.—National corporations are not to be regarded as foreign corporations in any state, unless they are created to operate in one of the territories or in the District of Columbia, in which case they are regarded substantially the same as if created by the legislature of one of the states, Congress merely acting as the local legislature in these cases. But corporations created by the federal government to perform its national functions, to operate in any state, are not foreign corporations in any state. By the National Banking Act, a national bank located in any particular state, is for most purposes treated as a citizen or inhabitant of that state; it, however, cannot be taxed in such state, or the exercise of its powers restricted by the state where it is located, in any other way than as is expressly authorized by the national laws.

Sec. 1313. THE STATE AND FOREIGN CORPORATIONS—RIGHT OF THE FOREIGN CORPORATION IN A STATE.—Strictly speaking the states of the Union are foreign to each other as regards most matters relating to corporation laws. While the ownership of property, so long as it is legal, in any state, by a corporation organized in another state is protected as is the property of an individual, and so long as its acts within the state are legal, it is protected under the provisions of the federal constitution. A foreign corporation's right, however, to do business in any state, is based upon mere *comity* and cannot be claimed as a legal right. It has the power to do business anywhere if not limited by its charter, but its *right* to do business in any other state than the one creating it, depends upon the consent of the state where it seeks to do business.

Sec. 1314. SAME SUBJECT—RIGHT TO ENGAGE IN COMMERCE.—While the general rule, as stated in the preceding section, prevents a foreign corporation from entering and establishing a place of business and exercising its corporate franchises in another state, without its consent, yet any corporation, just as a natural person, under the federal constitution has the right to engage in inter-state commerce, and when so engaged it cannot be excluded or controlled by any state.

Sec. 1315. SAME SUBJECT—WHAT IS INTERSTATE OR FOREIGN COMMERCE?—There is some difficulty in determining just what constitutes in-

ter-state or foreign commerce. But in general it includes buying and selling, and transporting across state or national lines, any commodity; or the traveling of any person; or the transmission of intelligence by telegraph or telephone across state lines. These things, constituting inter-state commerce, cannot be prevented, hampered or regulated by the states. A foreign corporation may make purchases through the mails, or it may send its traveling salesmen, or solicitors, into other states to make sales or purchases,—and if the goods are to be sent by the corporation to fill an order taken, or are to be sent to the corporation to fill a purchase made, across state lines, this is inter-state commerce. It has been held also that a ticket agent in one state to solicit passengers over a certain line of railroad, not having any part of its road in that state, is engaged in inter-state commerce. Inter-state commerce, by the federal constitution, is given entirely over to federal control through Congress, and the state cannot interfere with it in any way.*

It is held that the business of insurance, or borrow-

*State Freight Case, 15 Wall. 232; Crandall v. Nevada, 6 Wall. 35. But a state may tax a corporation on freight or passengers transported from point to point within the state. And also tax the gross receipts of a railroad or telegraph company after they have reached the treasury of the company, and though such receipts were in part earned from inter-state commerce, it is not held to be an interference with commerce. (State Tax on Railway Gross Receipts, 15 Wall. 284; Telegraph Co. v. Texas, 105 U. S. 460. But see, Fargo v. Michigan, 121 U. S. 230.)

ing or loaning money, manufacturing, mining, farming and the like are not to be considered as commerce.

Sec. 1316. SAME SUBJECT — RIGHT OF STATE TO EXCLUDE FOREIGN CORPORATION.—Within the limits as stated in the previous sections, any state has a legal right to exclude any corporation organized in another state, except such as are agents of the national government, for any reason, or without any reason. And after it has once granted a license to do business in the state to such a corporation, this license may be revoked at any time, though a valuable consideration was paid for it, without violating the federal constitutional provisions.*

Sec. 1317. SAME SUBJECT—METHODS OF EXCLUDING OR RESTRICTING FOREIGN CORPORATIONS.—In order to regulate and restrict foreign corporations doing business within their boundaries, states usually provide:—

1. That before doing business in a state, a foreign corporation shall appoint some one within the state upon whom service of summons may be made.

2. That when the corporations of, say, state A are excluded by state B, then state A will exclude the

*Bank v. Earle, 13 Pet. 519; Paul v. Virginia, 8 Wall. 168; Liverpool Ins. Co. v. Mass. 10 Wall. 566; Railroad Co. v. Com. 129 Pa. St. 463; Ins. Co. v. Burdett, 112 Ind. 204; Hartford Ins. Co. v. Raymond, 70 Mich. 485; Railroad Co. v. Harris, 12 Wall. 65; Pembina, Etc. Milling Co. v. Pennsylvania, 125 U. S. 181; Doyle v. Ins. Co. 94 U. S. 535; State v. Ins. Co. 92 Tenn. 420; State v. Carey, 2 N. Dak. 36.

corporations of state B,—these being called retaliatory laws.

3. That suits against such corporations shall not be removed by the corporations to the federal courts. While a provision of this kind cannot prevent the removal of a suit to the federal courts, the state, for a violation of the agreement, may exclude the foreign corporation that so offends from doing business within the state.

Certain penalties are usually provided for violating these provisions. Much controversy has arisen as to the validity of contracts made with a corporation that has failed to comply with them; the weight of authority probably is, that if a penalty is imposed either upon the offending corporation or its agent, that is the exclusive remedy, and the validity of the contract is not affected and may be enforced. This is particularly true when the complaining party who seeks performance of the contract, is the person contracting with the corporation, since such a provision is specially designed for his protection. If the corporation is complainant, many cases hold it can enforce a contract made by it, before it complied with the provisions of the state law in reference to its doing business within the state; while other cases hold that if there is no penalty, and the corporation has not complied with the provisions, its contracts are void and unenforceable by either party to them, until compliance has been made. This rule does not seem reasonable, so far as it applies to a contract which is sought to be enforced

against the offending corporation. For a failure to comply, the state, may, in either case, exclude the corporation.

Sec. 1318. THE NATIONAL GOVERNMENT AND STATE CORPORATIONS—THE TAXING POWER, A MEANS OF CONTROLLING THE TRUSTS.—Under the taxing power of the federal government, it has been held that State banks with power to issue bills and notes can be taxed by the National Government so heavily as to make it impossible for them to do a profitable business of this kind, and this is true even if the federal government levied the tax for the express purpose of protecting the National bank issues, and destroying the State banks. This power of the general government to tax has been suggested to be such that state corporations which engage in inter-state commerce can be taxed so heavily by the federal government upon such business that they cannot profitably continue their business, and in this way, it is suggested the National Government may control the recent unruly trusts. No case has yet been decided, and no legislation has yet been enacted by Congress undertaking to do this. In the case of state banks, they were allowed to reorganize as National Banks and thereby come directly under the control of the federal government.

Sec. 1319. SAME SUBJECT — ADOPTING STATE REGULATIONS. — Undoubtedly, though Congress has exclusive control of inter-state commerce, it may yet adopt, as a matter of expediency,

regulations made by a state, though they have the effect to exclude corporations or others from carrying on business that they would otherwise have the right to under the rule that such business constitutes inter-state commerce and could not be controlled by the state; and this may be done even against the state's wishes or consent. Thus Congress has by statute made it illegal to import into any state having a prohibitory liquor law, any liquors contrary to that law.

Sec. 1320. SAME SUBJECT—INTER-STATE COMMERCE.—The national government has provided an Inter-State Commerce Commission and authorized it to investigate and determine the validity of rates charged by railroads engaged in inter-state commerce, and to prevent their giving rebates and doing other unfair acts discriminating between shippers; but as the commission's powers are limited, and they have no authority to fix rates, but simply to investigate them, they have not yet accomplished much.

Sec. 1321. SAME SUBJECT — ANTI-TRUST ACTS.—The National Government, in 1890, passed an Anti-Trust Act, forbidding any contract or agreement which monopolized or attempted to restrain or monopolize, inter-state, foreign or territorial trade or commerce, under certain penalties, and requiring the various United States District Attorneys to enforce its provisions, and giving to any party injured by such action a right to recover damages for the injury he suffers because of such illegal monopoly or trust. The

act does not forbid or prevent a monopoly in the manufacture of articles, since this is not commerce; but any contract or agreement which directly restrains or interferes with such commerce is forbidden under the act.

CHAPTER VI.

SPECIAL RELATIONS OF CORPORATIONS.

Sec. 1322. THE CORPORATION AND ITS PROMOTERS — DUTIES OF PROMOTERS.— The promoters owe to the corporation the general duty to take no advantage of it. Hence if the promoters, while engaged in the promotion of the company, buy property for the corporation, they must let the corporation have it at the price paid by them for it, since they are regarded as standing in a trust relation toward the unborn corporation while so acting for it. Likewise if they buy property from themselves for the corporation they must not pay more than the property is reasonably worth. If they own or acquire property for themselves while not acting for the corporation, they have the perfect right to sell it to the corporation at any price they can obtain, provided they do not themselves, or by their dummies, represent the corporation in making the purchase.

Sec. 1323. SAME SUBJECT—LIABILITIES OF PROMOTERS.—The liabilities of the promoters may be: 1. To the corporation or its shareholders. 2. To the party with whom they deal. 3. Liability among themselves.

1. Liability to Corporation or Its Shareholders. The promoters are liable to the corporation or its shareholders, for all profits made by them in promoting the company, or while acting for it.

2. Liability to Party Dealt With. The promoters become personally liable to one dealing with them, even though their dealings are in the name of the corporation, for the reason that there is in fact no principal in existence that they can represent. This liability perhaps can be excluded by drawing the contract in such way as to make only the corporation liable, if anyone.

3. Liability Among Themselves. As between themselves, so far as they act in forwarding the scheme of incorporation in accordance with their agreement, they are substantially partners for the particular purpose, and one is bound by the acts of the others in carrying out the plan in the way contemplated. But as to other matters, not connected with the general scheme, only those who authorize, consent to or ratify the acts of the others, become liable therefor.

Sec. 1324. SAME SUBJECT—LIABILITY OF CORPORATION FOR ACTS OF PROMOTERS. —Inasmuch as the corporation does not become an entity until after the promoters' acts bring it into existence, it cannot be a party to a contract made for it by its promoters, and so is not liable thereon, unless it expressly or impliedly ratifies or adopts the act or contract after it has come into perfect existence. It is provided by some State statutes that the corporation shall be liable for the necessary expenses incurred in its organization. Some states also provide that the adoption of a promoter's contract by the corporation is really making a new contract which dates from the

time of its adoption, and must be entered into with all the formalities then required to bind the corporation.

Sec. 1325. THE CORPORATION AND ITS OFFICERS—GENERAL RELATION.—There are a number of theories as to the relation existing between the corporation and its officers. These are: 1. That the officers, including directors, are merely agents of the corporation or shareholders. This theory is not quite correct, since the directors have the power, when acting in good faith, to take action which does not coincide with the views or wishes of the shareholders.

2. Another theory is that the officers are trustees; this is not satisfactory, for there is no separation of the title of the property or holdings, into legal and equitable estates, and vesting the legal title in the trustees and the equitable title in the corporation, as would be the case if it were a true trust.

3. Another theory is that the officers of the corporation are mandatories; but this theory is also unsatisfactory and incorrect, since there is no vesting of the legal possession of the corporate property in them as a special property, as is the case in a true bailment. The true theory as to the relation is that it is one *sui generis* involving relations analogous to all of the above, but not exactly similar to any one of them.

Sec. 1326. SAME SUBJECT—GENERAL RULE AS TO DUTIES OF OFFICERS.—The officers owe the corporation the duty to exercise care and diligence, and a reasonable business judgment and prudence in

managing the corporate affairs; and for a failure in this regard, they may be held personally liable in an action for damages by the corporation. The officers have no right to any profits made by them while working for the corporation; all such profits belong to the corporation and may be recovered by it. The officers are liable for gross negligence in managing the corporate affairs, or in selecting unfit servants, or for failure to use ordinary care in supervising servants' acts when employed.

Sec. 1327. SAME SUBJECT—RIGHT TO REMOVE CORPORATE OFFICERS.—There is no well-defined power to remove elected officers,—as directors, president, etc.,—who are elected for terms fixed in the charter, general law or by-law, before the term has expired. Such provision may be made in the by-laws; and a court can, upon proper showing, remove corporate officers if they are violating their trust, the same as trustees may be removed. Agents of a corporation, though hired for a definite time, may be removed, subject to liability for damages if removed without cause before their time of service has expired; while if they are not hired for a definite time they may be removed at any time by the corporation, without it becoming liable for damages for such removal.

Sec. 1328. SAME SUBJECT—RIGHT OF OFFICER TO DEAL WITH THE CORPORATION.—The general rule in reference to an officer dealing with the corporation is, that an officer cannot right-

fully represent both himself and the corporation in making a contract with it; and any such contract is voidable by the corporation or its members, even though it were in fact fair and reasonable. If the corporation, however, is represented by other officers that have power to act for it in the transaction, there is no rule which forbids an officer from so dealing with it, and the resulting contract is valid. The same rule applies to corporations having common directors or officers, as to their dealing with each other through such officers; unless they are represented by non-common officers in the making of the contract, it is voidable, while if the non-common officers represent the corporations the contract is valid.

Sec. 1329. SAME SUBJECT—RIGHT TO RECEIVE SALARY.—The general officers in corporations, including the directors, are supposed to serve in their capacities as such without compensation, and hence after they have so acted, they cannot, without the consent of the shareholders, be voted salaries as back-pay,—since this would constitute giving away the corporate funds. But for extraordinary services, not included in the ordinary functions of the office, there is an implied promise to pay, and in such cases the directors have the right to fix the amount. The shareholders usually reserve the right to themselves to fix the salaries of the general officers, and leave to the directors the right to fix other salaries. There is an implied promise to pay any officer or any person who devotes his whole time to the service of the company

in ways other than merely performing the duties of his office.*

Sec. 1330. THE CORPORATION AND ITS SHAREHOLDERS — IN GENERAL.—It is the right of the corporation not to have its existence denied or questioned by its shareholders. So that the shareholders, under some circumstances, will be unable to prevent the corporation from,—issuing preferred stock; regulating transfers; carrying on the enterprise according to the directions of the majority of the directors; accepting amendments, in some cases, by majority vote; and when in failing circumstances, dissolving itself.**

Sec. 1331. SAME SUBJECT—RIGHT OF CORPORATION TO COLLECT SUBSCRIPTIONS.—In almost every state except the New England states, every subscription to stock in a corporation, unless otherwise stated, is considered as including an implied promise to pay for the shares when the corporation needs the money; the subscription being, usually, not a debt due immediately upon subscription, unless so made by statute in whole or in part, but only

*Bank v. Elliott, 55 Ia. 104; Am. C. R. Co. v. Miles, 52 Ill. 174; Ten Eyck v. Railroad Co. 74 Mich. 226; Jones v. Morrison, 31 Minn. 140; Miner v. Ice Co. 93 Mich. 97. An officer of a corporation cannot fix his own salary.

**Hazelhurst v. Railroad Co. 43 Ga. 13; Railroad Co. v. Jackson, 77 Pa. St. 321; Railroad Co. v. Thrall, 35 Vt. 536; Kent v. Mining Co. 78 N. Y. 159; McCullough v. Moss, 5 Denio, 575; Railroad Co. v. Zimmer, 20 Ill. 654; Banet v. Railroad Co. 13 Ill. 504; 18 Mo. 210.

an agreement to pay when demanded by the proper corporate authorities.

Sec. 1332. SAME SUBJECT — CALLS FOR PAYMENT OF SUBSCRIPTIONS.—As a rule, before any particular amount is due upon any subscription, a *call* is to be made by the directors; this call, at common law, was made by simply passing a resolution that a certain per centum of the amount subscribed should be due and payable at a certain time. Every shareholder was supposed to take notice of such resolution, and was in default if he did not comply with it. It is usual now to require notice of some sort to be given of the fact of making the call, and also of the time and place where it shall be payable. It becomes a debt due the corporation as soon as due, and may then be sued for by the corporation. To be valid, calls must operate equally, and be uniform as to all subscribers. There is no right, unless expressly conferred, to call for any more than the face value of the amount subscribed, or the amount agreed to be paid in the subscription contract.

Sec. 1333. SAME SUBJECT—EVIDENCE OF MEMBERSHIP. — The corporate records, such as subscription or transfer books, are *prima facie* evidence as to who are members of the corporation in stock-companies; they are not, however, conclusive. And one whose name is on the books may show that he is not in fact a member; and one whose name is not on the books may show that he is in fact a mem-

ber, and demand to have his name entered on the books.

Sec. 1334. SAME SUBJECT — RIGHT TO VOTE.—At common law every member had a right to one vote on every proposition, and no more than one vote; that is, they did not vote according to the shares owned. But now, by custom, by-law, charter or statute, the rule is almost universally the other way, and a shareholder has one vote for each share of stock owned by him. The holder of the legal title of the stock or shares has a right to vote them; executors and administrators vote the stock belonging to the estate which they represent before distribution. But the corporation cannot vote its own shares held by itself. A shareholder can vote to suit his personal interest, even though such interest is in conflict wtih the corporate interests.

Sec. 1335. SAME SUBJECT — VOTING BY PROXY.—At common law, the member, unless the charter expressly authorized, had no right to vote by proxy, but must vote in person. But now statutes universally allow voting by proxy; by which is meant, that the shareholder may appoint someone to be his *proxy* or attorney in fact, to attend a certain meeting and vote all the shares that his principal owns, upon all questions lawfully coming before the meeting, as fully as the owner could do if he were present in person. No special form of wording such authority is necessary.

Sec. 1336. SAME SUBJECT—IRREVOCABLE PROXY.—There have been some attempts to make proxies irrevocable. But it is held that they cannot be so made, even for a consideration. Irrevocable proxies being considered such a separation of the interest and its control as is contrary to public policy, so that though an alleged irrevocable proxy has been given, its giver may cancel it at any time.

Sec. 1337. SAME SUBJECT — VOTING TRUSTS. — Voting trusts are agreements among shareholders to vote all the shares they own in the way the majority of the parties to the agreement direct, or in the way some trustee or outside party shall direct; when such an agreement is entered into for the purpose, and having the effect of placing the control of the corporation in a minority of the shareholders, it is generally held voidable and unenforceable at the option of any party to it. In some cases where they serve the purpose of sustaining or preserving rights that otherwise might be in peril, they have been upheld. Such agreements are also generally upheld in New York and California.

Sec. 1338. SAME SUBJECT—CUMULATIVE VOTING.—Cumulative voting is a method authorized by statute, and is designed to allow the minority of shareholders to obtain representation upon the directorate of the corporation. It may be illustrated thus: A owns ten shares of stock in a corporation having five directors, and would ordinarily only have the right to vote his ten shares for each of the five

directors, or fifty for all of them; the cumulative vote expressly authorizes him to vote his fifty votes for one director, instead of ten for each of five directors as he is ordinarily compelled to do; or he may cast twenty-five votes for each of two candidates, and none for the others, or make such cumulation or separation of his votes as will best serve his interests in getting represented in the directorate.*

Sec. 1339. SAME SUBJECT—DIVIDENDS.—By a dividend is meant a sum set aside out of the corporate profits to be divided among the shareholders in proportion to their holdings. Dividends, in order to be valid, must be declared out of the corporate profits—that is, the balance remaining in the corporate treasury after all current expenses of operation and fixed charges are paid and losses in capital are made up. When the corporation has earned profits which could be applied to the payment of dividends, and also has the power to increase its shares of stock, it may keep the money and declare a *stock dividend,* by issuing shares instead, to an amount in face value equal to the profits to be divided. Before dividends belong to the shareholders, and not to the corporation, they must be declared by the board of directors, and the funds set aside to pay them; from that time the shareholder is considered part owner of the fund set aside,

*This cumulative method of voting is being advocated in general elections where there is more than one public officer to be elected to the same body, in order to give minority parties representation in the governing bodies.

though not yet due; without this setting aside of a particular fund or amount out of which payment is to be made, the shareholder is a mere creditor as to the amount declared, and must share with the other creditors in case insolvency afterward occurs before payment. The shareholder must demand payment of the sum so set aside before the corporation is in fault; after demand he can sue the corporation for refusing to pay, either in assumpsit or for debt.

Sec. 1340. SAME SUBJECT — WHO IS ENTITLED TO DIVIDENDS. — The owner of the shares at the time the dividends are declared is entitled to them, and it makes no difference when they were earned, or when they are to be paid. If A is the owner of shares when a dividend is declared, it belongs to him, though it does not become due until after A has transferred his shares to B. So, likewise, if A sells to B before a dividend is declared, it of right belongs to B. though it is declared before the transfer on the books is made to B; in this case, however, the corporation will be justified in paying to A, if it has no knowledge of B's claim; and generally the corporation is protected if it in good faith pays to the registered owner.

Sec. 1341. SAME SUBJECT—DIVIDENDS AS BETWEEN LIFE TENANT AND REMAINDERMAN.—As between the claims of a life tenant and remainder-man to stock dividends the cases are in conflict; one line of authorities hold that if the dividend is declared in money, it is always to be paid to the life

tenant as income; while if it is a stock dividend, it is all to be paid to the remainder-man as part of the estate. Another rule is, that if the dividend is ordinary—that is, one arising from the ordinary operations of the company—it will go to the life tenant; but if extraordinary, such as declared out of the capital when the stock is lawfully reduced,—all of it should be paid to the remainder-man. Another rule, and the one having the weight of authority, is that the courts will investigate when the dividend was earned; if earned before the death of the person creating the tenancy for life, and in remainder, it will go to the remainder-man; if it in fact represents earnings accumulated after the death of such person, it will go to the life tenant, whether paid in money or stock.

Sec. 1342. SAME SUBJECT—TRANSFER OF SHARES—THE RIGHT TO TRANSFER. — The general method of transfer has been described in a previous section. The right to transfer is an incident of the ownership of the property in the shares,—and the corporation, unless the state expressly allows, cannot prevent such transfer, although it may regulate it by reasonable provisions for the protection of the corporation. There is no right generally recognized in this country to transfer shares after insolvency, or to transfer to an incompetent or insolvent person for the purpose of evading liability.

Sec. 1343. SAME SUBJECT—REGISTRATION OF TRANSFER OF SHARES.—There are two theories as to the necessity of the registration of the

transfer of shares on the books of the corporation;— one is that the legal title does not pass by the delivery of the certificate duly endorsed and assigned, but that registration is essential to pass the legal title, only the equitable title passing until such registration is made; the other theory is, that as between the parties themselves, and all other parties claiming through them, the whole title passes by the delivery of the certificate of stock duly endorsed with a power of attorney to have the transfer made on the books of the company. As between the corporation and the transferor or transferee, until the registration is made on the books of the company, the corporation may, until it is satisfied of the right of the transferee, recognize the registered owner. The above rules become of importance in the case of attaching creditors of the transferor, and give exactly opposite results. As between pledgor and pledgee, registration is unnecessary. But the pledgee in order to prevent the possibility of loss, usually has the stock registered in his name.

Sec. 1344. SAME SUBJECT — EFFECT OF TRANSFER OF STOCKS UPON FORGED POWER OF ATTORNEY.—The transfer of shares upon a forged power of attorney has no legal effect upon the rights of the original owner, as he cannot be deprived of his property by forgery unless he is in some way chargeable with negligence. If the corporation accepts and cancels a forged certificate, and issues a new one in its place, a *bona fide* purchaser of the new certificate is protected, but if the corporation has is-

sued all the shares it has a right to issue, the purchaser has an action for damages against the corporation; for the certificate is a continuing representation of the validity of the shares when issued to an innocent party; the original owner can still claim the rights of membership; the forger, or the person who induces the corporation to act, is liable to it for any loss it sustains. The same rules apply to the case of lost certificate of shares, if the owner of the certificate is not at fault.

Sec. 1345. SAME SUBJECT — EFFECT OF TRANSFER OF SHARES IN BREACH OF TRUST.—Where one person holds shares in trust for another, and there is nothing in the certificates, or on the register, to show that a trust exists, a *bona fide* purchaser from the trustee will obtain a good title as against the *cestui que trust,* and the latter must look to the trustee. While if the certificate or register shows that a trust exists, the purchaser takes it subject to the trust. So that if the corporation has knowledge of the trust, or of any limit upon the power of the trustee to transfer the shares, and it knowingly allows him to transfer contrary to his authority, the corporation thereby becomes liable to the party injured.

Sec. 1346. SAME SUBJECT—HOW A GIFT OF SHARES MAY BE MADE.—A gift of shares may be made by a delivery of the certificate properly indorsed for that purpose. Registration is not essential to the validity of the gift.

Sec. 1347. SAME SUBJECT—EFFECT OF THE TRANSFER OF SHARES. — The general rule is that the transferer of shares is no longer a member, and is no longer in any way liable to the corporation or its creditors, even though the shares are not fully paid; the purchaser, on the other hand, assumes, if he has knowledge of the facts, all the obligations, and is entitled to all the rights of the seller. If he has no knowledge that the shares were not paid up, in the absence of any statute to the contrary, he is not liable to the corporation or its creditors.

Sec. 1348. SAME SUBJECT—REMEDY FOR REFUSAL TO TRANSFER.—The remedy for a refusal may be an action to recover the value of the shares, as damages; the value usually being that at the time of the refusal; but by some courts it is the value at the time of the trial or the highest value at any time between the refusal and the trial. And under some circumstances, a court of equity, or a court of law, will compel the transfer of shares, in case of a refusal.

Sec. 1349. SAME SUBJECT — SHAREHOLDER'S RIGHT TO INSPECT BOOKS.—At common law a shareholder had the right to inspect the corporate books whenever there was a real matter of controversy between him and the corporation, its officers or shareholders, which made it necessary to see the books; now by statute it is generally provided that a shareholder has the right at reasonable times to see the books and take copies of the entries by himself or

his agent without there being an actual controversy existing; the right to inspect the books must be exercised at a reasonable time; if refused, an action for damages will lie, or the custodian may be compelled by mandamus to permit inspection.

Sec. 1350. SAME SUBJECT — RIGHT TO SHARE IN INCREASE OF STOCK.—Where the corporation has the right to increase its capital stock, each shareholder has a right to subscribe for such proportion of the new stock as his holdings are of the old stock, in preference to outside parties.

Sec. 1351. SAME SUBJECT—SHAREHOLDER'S RIGHT TO SUE FOR MONEYS DUE THE CORPORATION.—The general rule is that shareholders have no right to sue for moneys due the corporation, the corporation itself being the proper party to maintain the action. But in some cases there would be a failure of justice if the shareholders were not allowed to bring the suit. Whenever the corporation is unable to sue for a wrong done it, then a *bona fide* shareholder may, upon behalf of himself and all others, sue to have the wrong righted. The wrongs for which suit may thus be brought are the *ultra vires* acts of the agents, resulting in damages to the corporation; the fraudulent acts of the directors, or their acting in their own interests instead of the corporate interest; and oppressive or fraudulent acts of a majority of the stockholders. The plaintiff must usually allege and show that he tried to have corporate action taken through the proper corporate agency, to have the

wrong righted, and that they refused, or that the wrongdoers were the corporate officers themselves, who had authority to have the corporation sue. If the offense charged is one that the shareholders could ratify, the courts will not interfere until they have been called to pass upon the matter, unless delay would endanger substantial rights.

Sec. 1352. CREDITORS—CREDITORS AND THE STATE.—As a general rule, the state, unless it has reserved the power to amend or repeal a charter, cannot repeal or change the statutory contractual liability of shareholders, so as to impair the security of existing creditors; but the penal liability of shareholders may be repealed or changed, and if the state has reserved the power to repeal, the contractual liability may be changed; dissolution by the state does not affect creditors' rights; they are still enforceable against the assets of the corporation. The state may modify the remedies against a corporation, provided they are not substantially taken away.

Sec. 1353. SAME SUBJECT—CREDITORS AND THE CORPORATION.—Creditors have all the ordinary rights to enforce their claims against the corporation in the usual way in courts, that they have against individuals, except that property necessary for the corporation to perform some public duty cannot be taken on execution; but the income from such property may be secured in equity or otherwise to apply on the claims of creditors. But creditors have no

right to interfere with, or dictate in regard to the manner in which the corporation is managed.

Sec. 1354. SAME SUBJECT—PREFERRING CREDITORS.—Corporations, by the great weight of authority, have the same right to prefer a creditor in case of insolvency that an individual has. Where this rule applies, a *bona fide* shareholding creditor, or a creditor who is a director in the corporation may be preferred. In some of the states it is held that as soon as insolvency occurs, the assets of the corporation become a trust fund for creditors, for distribution among all the creditors in proportion to their claims; and that the corporation can give no preferences.*

Sec. 1355. SAME SUBJECT—ASSETS ARE REGARDED AS A TRUST FUND FOR THE PROTECTION OF CREDITORS.—The general doctrine is that the capital of a corporation is a fund set apart for the protection of creditors, and cannot be given away, or distributed among shareholders until creditors are fully paid. (Sanger v. Upton, 91 U. S. 56.) It is further held, that there is included in this fund, not only any property the corporation may have, but the sums unpaid by the shareholders upon their stock subscriptions, so far as may be necessary to pay

*That a corporation may prefer creditors, in the absence of express statutory provision, see: Chamberlain v. Bromberg, 83 Ala. 576; Reichwald v. Hotel Co., 106 Ill. 439; Kendall v. Bishop, 76 Mich. 634; Wilkinson v. Bauerle, 41 N. J. Eq. 635; Rollins v. Carriage Co., 80 Ia. 380; Coats v. Donnell, 94 N. Y. 168. Contra, Rouse v. Bank, 46 Ohio St. 493; Hardware Co. v. Stove Mfg. Co., 86 Tex. 143.

creditors; and all claims due the corporation from whatever source may be collected and applied to satisfy claims of creditors; also all capital of the company distributed to the shareholders, that has had the effect to reduce the property below the amount of capital stock that the corporation should have, can be recovered, if necessary to pay creditors; and, in those states where stockholders' double liability is recognized, creditors can enforce their claims against the stockholders to the extent of this liability. (102 U. S. 422.)

Sec. 1356. SAME SUBJECT—RIGHT OF CREDITOR TO PREVENT DISSIPATION OF FUNDS.—Though the creditors have no right to interfere in the corporate management; yet they may, in certain cases, bring proceedings to enjoin threatened acts or wrongs on the part of the corporation, which would have the result to destroy the security of the creditors; so they may enjoin a waste of the corporate funds, and have conveyances set aside which were made in fraud of their rights. In such cases the creditor must first establish his claim by a judgment at law, or in some other way obtain a lien upon the corporate assets, before a court of equity will give him such relief.

Sec. 1357. SAME SUBJECT—CREDITORS AND OFFICERS.—So long as the officers of the corporation keep within their authority, they do not make themselves liable to creditors upon contracts they make for the company; if they exceed their authority, they

become liable to those with whom they contract; if they commit a tort while acting for the company, they are liable therefore to the person injured, although the corporation may also be liable. The directors may be liable for tort in so managing the corporation as to create or maintain a nuisance; and under some circumstances, if they are negligent in managing the corporate affairs, so that the corporation would have an action for damages against them, upon insolvency, such a claim for damages is an asset which the creditors have a right to have enforced against the officers, if necessary to pay their claims.*

Sec. 1358. SAME SUBJECT—STATUTORY LIABILITY OF OFFICERS.—In many of the states, where officers fail to make certain required reports, or make false ones, or incur debts in excess of a certain amount, they are made liable for the debts of the corporation; in such cases the statutory method of recovery, if any is fixed, must be followed; but the courts will allow recovery to be made in some of the ordinary forms of proceeding, if no special form is provided.**

Sec. 1359. SAME SUBJECT—CREDITORS AND SHAREHOLDERS.—Creditors have no rights

---

*2 Mor. Priv. Corp., Secs. 795-6; Gratz v. Redd, 4 B. Monr. (Ky.) 178; Hun v. Cary, 82 N. Y. 65; Marshall v. Bank, 85 Va. 676; Spering's Appeal, 71 Pa. St. 11; Mowbray v. Antrim, 123 Ind. 24.

**Bruce v. Platt, 80 N. Y. 379; Gaus v. Switzer, 9 Mont. 408; Matthews v. Patterson, 16 Colo. 215; Patterson v. Mfg. Co., 41 Minn 84.

against shareholders in the absence of a special statutory liability, provided the corporation is *de jure,* and the face value of the stock has been fully paid in, and there has been no distribution of the capital stock before creditors are paid. The liability of shareholders arises in one of two ways:—1. From the common law. 2. Under special statutes. The common law liability arises principally under one of these three circumstances: (a) Imperfect organization; (b) Failure to pay in full the amount subscribed; (c) Payment of dividends out of capital instead of from profits.

(a) Imperfect Organization. The liability arising from imperfect organization is based upon the rule that when a number of persons undertake a business transaction and fail to become incorporated, the common law partnership liability results. If the corporation is *de facto,* the weight of authority holds that there is no other than the corporate liability; and so, too, where there is an estoppel against a particular creditor, he cannot hold the members to an individual partnership liability.

(b) Failure to Pay Amount Subscribed in Full. Since the capital stock is a fund for the protection of creditors, it is in the nature of a fraud for the corporation or the shareholders to claim to have a capital stock up to a certain amount which it has never received; the courts say that for the protection of creditors, when necessary for their payment, the shareholders will be required to make this representation good, by making payment of the balance due upon the capi-

tal stock; this is what is usually meant by saying that such subscriptions are a trust fund for the creditors' security.

(c) Payment of Dividends Out of Capital. If the shareholders divide the corporate assets among themselves, before paying the creditors, the result is the same as in the preceding cases, and the creditors have a right to have the sum so distributed paid back so far as may be necessary to pay their claims in full.

In the last two instances above mentioned, the creditor's rights arise only after he has established his claim by judgment against the corporation, and has taken out execution against the corporate property and had it returned unsatisfied, or partly so. Then he has the right to sue the shareholders in equity to have the sums due the corporation paid in to satisfy his claims; he must usually bring a creditor's bill in such a way that the other creditors can come in and share in the proceeds in proportion to their claims.

A judgment against the corporation is conclusive as to the debt of the corporation, and an assessment against the shareholder by the court cannot be questioned by the shareholder; but he can contest his liability on the ground that he is not a member, or that the judgment was fraudulently obtained.

A receiver is usually appointed in such cases by the court who has authority to sue any shareholder in any state, who owes the corporation, to recover the amount so due; the liability of the shareholder is several, but it is usual in such a suit to join all, though some are out of the jurisdiction of the court.

Sec. 1360. SAME SUBJECT—EFFECT OF AGREEMENT TO PAY IN PROPERTY ON RIGHTS OF CREDITORS, ETC.—Where the creditor has a right to proceed against the shareholders for a failure to pay the full amount of stock subscribed by them, a difficult question sometimes arises as to the liability of shareholders who have an agreement with the corporation by which they are not to pay in full for their shares. Such agreements are valid as between the corporation and the shareholder, but are generally invalid as against creditors. As a rule the creditor can require full payment from the stockholders for his protection, except in four cases:

1. When the shareholder has purchased, in good faith, shares that were not in fact fully paid, he is not liable to creditors for the unpaid amount.

2. When the corporation is in failing circumstances, but with the power to increase its stock, and it does this under stress of circumstances, and in good faith, to re-establish itself, it may sell such stock at its market value, or issue it as bonus along with bonds issued to tide over its difficulties, and those who take the stock or bonds, or both, in good faith, at their market value, will not be held to any further liability in favor of subsequent creditors.

3. It is held in New York and Illinois, that a corporation like a railroad company may issue its shares below par, or at their market value, in payment of a construction company for the construction of its road, and such company is not liable to subsequent creditors

for the difference between the face value of the shares, and the price at which they were taken.

4. In case shares are paid for in property, it is generally held that so long as there is no actual fraud in valuing the property, whatever price it is taken at, even if it is an overvaluation, shall be final, and creditors cannot complain; but in some states, notably Missouri, any overvaluation of property taken in payment of shares, though done in good faith, must be paid back to the company by the person receiving the shares upon that basis. Many cases also hold that an excessive overvaluation is *prima facie* fraudulent, and the discrepancy will be required to be satisfactorily explained, or made up.

Perhaps good will is property with which shares can be paid, if it really exists in the particular case; so labor, services, patents, franchises, and the like, are property with which shares may be purchased.

Sec. 1361. SAME SUBJECT—2. LIABILITY OF SHAREHOLDERS UNDER SPECIAL STATUTES.—Statutory liability is one imposed upon shareholders by special statute over and above their common law liability, for the protection of creditors; it is not generally a part of the corporate funds for the purpose of carrying on its business, but it is rather a security for creditors alone. As to its legal character, this statutory liability is either:—1. Contractual, or 2, Penal.

The contractual statutory liability may be either, (a) A joint and several unlimited primary liability;

(b) A joint and several unlimited secondary liability; or (c) A limited primary or secondary liability.

If *primary,* the liability arises at the time the liability of the corporation does; if *secondary,* it arises only after the corporation is unable to pay; if *unlimited,* it is substantially that of a partner; if *limited,* then it extends only to the limit fixed, which is usually a sum equal to the amount of the subscription, or such a proportion of the debts as the shareholder's shares are to the total shares. If it is primary, the statute of limitations would begin to run at the same time it does against the corporation; if secondary, only after it was established that the corporation could not pay. This liability may be provided in constitutional or statutory provision; if it is provided for in the constitution, it will be self-executing whenever it is fixed in amount, and no special machinery is necessary for its enforcement.

Sec. 1362. SAME SUBJECT—WHEN LIABILITY PENAL IN FORM WILL BE CONSIDERED CONTRACTUAL IN NATURE.—A penalty is a punishment or fine provided for doing something that is forbidden, and is to be recovered by the state; it can be changed or modified at any time, and it is not enforceable outside of the state. Some of the statutory liabilities of shareholders are similar in form to penalties, but if they are designed for the protection of creditors, in such a way that the offender becomes a debtor to the creditor by his failure, they are usually considered contractual in nature so as to allow suits to be

brought in other states, for their enforcement in favor of creditors. If the liability is contractual, subsequent creditors have a vested right to its enforcement for their protection, so that it could not be taken away without their consent; such a liability also survives and attaches to the estate of a deceased shareholder, and may be enforced against it; or the representative of a deceased creditor can enforce it against shareholders.

Sec. 1363. SAME SUBJECT—ENFORCEMENT OF STATUTORY LIABILITY IN OTHER JURISDICTIONS.—If a special remedy is provided in the state creating the statutory liability of such a kind, that the right cannot be separated from the proceeding, and this is different from the proceeding in the state where it is sought to be enforced, it cannot be enforced in the other state at all; but if no special remedy is provided, and it is of a kind that can be enforced in a foreign jurisdiction by the ordinary procedure there, it may then be enforced in such foreign jurisdiction. The usual method of enforcing such statutory liability, is by means of a creditor's bill and the appointment of a receiver, mentioned in a preceding section.*

*It is expected to supplement the books of the Home Law School Series, by a series of case books, presenting the leading cases upon each of the subjects treated in the various numbers of this Series. These case books will be edited shortly after the completion of the present Series, and will add materially to their value by giving practical applications of the rules herein presented.

PART II.

PRINCIPLES OF THE LAW OF PUBLIC CORPORATIONS.

CHAPTER I.

THE SUBJECT INTRODUCED AND DISTINGISHED.

Sec. 1364. WHAT THE SUBJECT INCLUDES. —By public corporations is usually meant cities and villages, though the subject also includes townships and counties. Public Corporations, strictly speaking, are organized to perform functions of local self-government; they are state agents, as it were, and represent the state to the extent of the power conferred upon them.

A public corporation emphasizes that part of the definition of a corporation which characterizes it as a *legal entity,* created by the state or sovereign. The term *entity,* signifying *oneness,* and typifying the unification of a large body of inhabitants into one distinct legal personality, for the purpose of government as to local matters.

Sec. 1365. SOME PRE-REQUISITES TO THE CREATION OF A PUBLIC CORPORATION.— A corporation is always to be distinguished from a voluntary association, since its sole right to existence is derived from the state, or sovereign power, through

the legislature. Its assumption of an artificial form or entity must be authorized by law; and this is so whether the corporation is *de facto* or *de jure*. If there is no law authorizing such a corporation, or making its formation a possibility, there cannot be even a *de facto* corporation. Again, the authority which the corporation exercises, must of necessity be founded upon constitutional or statutory provisions, since all of its powers are, originally, a part of the governmental powers of the sovereign. How the legal entity may be named or designated is immaterial; and though designated as a partnership, if it possesses the common law incidents of a corporation, it is a corporation.

Sec. 1366. CREATION OF PUBLIC CORPORATIONS, IN GENERAL.—Under the common law public corporations were created by king's grant or charter; by act of Parliament; and by prescription. In this country we have no king to grant charters, and very few corporations by prescription, since by prescription is meant, that the corporation was founded so long ago that the records of its incorporation have been lost. While such corporations are common in England, where anciently, boroughs had the right to send representatives to Parliament, and their corporate existence, while fictitious, was allowed because no one could tell when they began to exercise corporate powers.

In the United States public corporations are created by the legislature, either under general laws, or by

special enactment, and some few cases of early New England towns may be regarded as corporations by prescription. Counties and townships are usually incorporated under some general law, while cities and villages are frequently incorporated by special enactments. But in some states at the present time, cities are required to be incorporated or classified under general laws; the powers and incidents of each class being prescribed by statute.*

Sec. 1367. PUBLIC AND PRIVATE CORPORATIONS DISTINGUISHED. — We have seen (Ante, Sec. 1207) how corporations are classified, and that the fundamental or principal division of corporations is into *public* and *private.*

While the *prima facie* distinction between public and private corporations is that the former pertains to public affairs, and the latter to private ends, yet this distinction is one of shadow rather than substance, as in one sense all corporations are public, since they are not created, presumptively at least, without considering the public good, and with the design to further the public welfare. The chief distinction lies in the difference "in the character of the persons who compose the corporation and the nature

*See the Municipal Code, passed by the legislature of Ohio, in 1902, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such powers, as required by the constitution of Ohio, and to repeal all sections of the statutes inconsistent therewith, 96 Vol. Ohio Laws, 20.

of the rights created by such incorporation."* A private corporation, as we have seen, results from an express or implied contract between the corporators and the state, and is founded on offer and acceptance the same as any other contract. The contract giving rise to rights which are protected from violation by express constitutional provision. Public corporations, are not the result of any contract between the corporators and the state, and their creation does not vest any inviolate rights in the members as private individuals, their object and purpose being to enable the state to better provide for the government of the people, by bestowing a portion of its power upon the corporation or community in pursuance of the scheme to carry out local self-government. So that the power of the legislature over public corporations is almost absolute, allowing it to modify, enlarge, or diminish charter powers at will; while the charter rights of private corporations are protected.**

Sec. 1368. PUBLIC AND MUNICIPAL CORPORATIONS DISTINGUISHED.—While municipal corporations are public, they are distinguishable from other *public* corporations, to an extent that will not warrant the terms, *municipal,* and *public* corpora-

*Tiedeman, Munic. Corp., Sec. 2; Guest v. Water Co., 21 Atl. 1001; Dartmouth College v. Woodward, 4 Wheat. 518.

**Penobscot B. Cor. v. Lawson, 16 Me 224; Phila. v. Field, 58 Pa. St. 320; State v. Atkinson, 107 N. C. 317; Columbus v. Columbus, 52 N. W Rep. 425; Merriweather v. Garrett, 102 U. S. 472; Morris v. State, 62 Tex. 728.

tion, being regarded as synonymous. This distinction is thus explained by Professor Tiedeman:

"The municipal corporation is, as its name implies, an incorporation, or body politic, created by the act of law as an instrument of government over a particular community, and over the people located there. A municipal corporation is, in the first instance, charged with the exercise of all the powers and the performance of *all* the duties which are strictly local or municipal in their nature, and which are of peculiar interest to the local community. They are incorporated for the purpose of giving to such community the peculiar facilities, for carrying on or conducting its local affairs, which a private corporation acquires by incorporation over the voluntary union or combination of individuals. We may, therefore, define a municipal corporation, in its historical and strict sense, to be the incorporation, by the authority of the government, of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulations, with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper. As thus defined, the municipal corporation is to be distinguished from other public corporations, like counties on the one hand, and school districts on the other. The municipal corporation is to be distinguished from counties and other subdivisions of the state, in that

the county is not a legal personality in whose hands is intrusted a share of the administration of the government, but simply a territorial subdivision of the state government and subject to the essential control of such state government, in the administration of all of its affairs. Thus, for example, a court will declare that a county is not liable, independently of modern statutory modifications, in damages to one who has suffered an injury from the wrongful official conduct of the county officers. Even independently of any statutory provision, the municipal corporation is held liable. . . . But the main distinction, and the only reliable one, between public corporations, like counties, and municipal corporations proper, is the absence in the one case of an incorporation and its presence in the other. Indeed, counties are not properly denominated corporations. They are at most only *quasi* corporations, with considerable emphasis on the prefix." . . .

"There is still another distinction between municipal corporations and these *quasi* corporations, in regard to their liability to persons injured by the negligence of the officers. Thus a school district is held to be free from liability for the trespass committed by its officers. But in the case of a municipal corporation, the courts have held that the individuals, who compose the community within the jurisdiction of the municipal corporation, enter into and become parties to all the acts of the municipal government, or of the officers of such municipal corporation, and are liable

to all parties who may be injured or wronged by the wrongful acts of these officers."*

Sec. 1369. CLASSIFICATION OF PUBLIC CORPORATIONS.—We have seen that municipal corporations are distinguishable from other public *quasi* corporations, such as counties, townships, and the like, and hence for convenience and to prevent a confusion of terms, public corporations may be classified, as: *Administrative,* and *Municipal.*

By administrative corporations we mean those public *quasi* corporate agencies through which the functions of the state government is performed; such as school and road districts, counties and townships.

By municipal corporations we mean cities and villages, possessing peculiar local powers by reason of the aggregation of persons in a comparatively small compass.

In addition to the distinctions pointed out in the last section, another difference of importance made between municipal and administrative corporations lies in the construction of their implied powers; the courts will always construe the charter of a municipal corporation as giving a larger police power by implication, than would be given to administrative corporations.

Sec. 1370. AUTHORITIES ON PUBLIC OR MUNICIPAL CORPORATIONS.—The treatise on

*Munic. Corp., Sec. 3; citing, Enfield v. Jordan, 119 U. S. 680; Martin v. People, 87 Ill. 524; Union Township v. Gibboney, 94 Pa. St. 534.

Municipal Corporations, by J. F. Dillon, in two volumes, is a standard American work; Professor Tiedeman's work on Municipal Corporations in one volume is also a reliable book; other treatises by Beach, Elliot and Smith are valuable.

CHAPTER II.

Administrative Corporations.

Sec. 1371. THREE TYPES OF POLITICAL COMMUNITIES POSSESSING CORPORATE POWERS IN AMERICA.—In this country there are at least three distinct types of administrative corporations or political communities possessing corporate powers. These three types are: 1. The New England town. 2. Southern Colonial Counties. 3. A combination of the town and county as found in the West and Northwest.

1. The New England Town. The New England town, in addition to other peculiarities, differs from the other administrative corporations in that it is a purely democratic institution.* In New England the town was self-governing, the inhabitants meeting together in the church or town hall to transact all pub-

*"When settlers came over from England to Massachusetts, they usually came in congregations led by their ministers, and settled together in parishes, or townships. In this way the soil of Massachusetts gradually became covered with little self-governing republics, called townships, or towns, each about six or eight miles square, with a village street for its center, surrounded by spreading farms. The church in the village was used not only for religious services, but also for transacting public business, and was always called the meeting-house. At a later time it was used only as a church, and another building, called the townhouse or town-hall, was used for public purposes."—Hist. of the U. S. by John Fiske, at page 94.

lic business, so that their corporate powers have come to resemble both those of a municipality and of township or counties as subdivisions of the state government. The distinction originated from the little self-governing communities which established themselves in New England in colonial days, and has been continued by the state statutes giving to these town-counties certain powers and duties, approximating in many ways to the character of an incorporated city.* Still they are not cities in the strict sense of the word, and resemble school-districts in that their powers are limited, and do not extend to all the powers usually possessed by a regularly constituted municipal corporation. As a result of this distinction, the student will find that a decision in New England upon municipal corporations may be quite different from those in other states as to the powers and rights incident to them, and that English authorities on the subject will not be considered as directly applicable to New England towns.**

2. Southern Colonial Counties. The southern colonial counties were without townships, and unlike the present counties which are composed of a number of townships. The southern county was of a more democratic character, and resembled, in many respects, the New England town, although much larger.

---

*Tiedeman, Munic. Corp., Sec. 4.

**Eastman v. Meredith, 36 N. H. 284, 290; Bloomfield v. Bank, 121 U. S. 121; Webster v. Harwinton, 32 Conn. 131; Dillon, Munic. Corp., Secs. 28-30.

3. A Combination of Town and County. As population increased and spread over greater areas, the democratic institutions of New England and the South, became impracticable; and government as to local matters, instead of being democratic became representative in character. All through the West and Northwest the political community for some purposes is the township and for others is the county; the county being made up of townships; and for some purposes the political unit being a ward of a city.

Sec. 1372. PECULIAR CHARACTERISTICS OF ADMINISTRATIVE CORPORATIONS.— The political or public corporations which we have designated as *administrative,* such as counties, townships, school and road districts, and the like, may be created, changed, or destroyed at the will of the legislature. They are regarded as being agencies of the state, and as such have no vested, or contract right to existence as have private corporations. A township or county, as a corporation, has no vested rights against the law-making power. While municipalities, or cities and villages, have some kinds of corporate powers of which they cannot be arbitrarily divested by the state.*

*"In regard to the powers and property which are vested in a municipal corporation in its public character, as a branch of the state government, there can be no limit to the control of such corporation by the state. But where the municipal corporation, as it always does, by virtue of its existence as a legal personality, acquires the rights of property of a private character for the benefit of the community which has been in-

But, unless restrained by constitutional provision, the legislature has full power to change or divert the property rights of administrative corporations, as to arbitrarily change the location of a county seat.* So the state may abolish a county altogether, extend or limit its boundaries, divide it into two or more, or consolidate two or more into one.**

Again, counties and towns have only such corporate powers as the legislature may have conferred.***

---

corporated, and in the enjoyment of which the state is not concerned, these proprietary rights constitute in the constitutional sense vested rights, if not of the municipal corporation itself, yet of the community which has been incorporated, which cannot be divested or taken away by legislative action. In respect to these semi-private rights the legislative control is not unlimited."—Tiedeman, Munic. Corp., Sec. 9. Public Parks are given as an example of such property, see state v. Sweickardt, 19 S. W. Rep. 47; People v. Detroit, 28 Mich. 288.

*Blackf. (Ind.) 208; 8 Blackf. 361; 17 Wall. 322; 4 Scam. (Ill.) 273; 16 How. 369; Edwards v. Jagers, 19 Ind. 413; Fulton Co. v. Rickel, 106 Ind. 503; Hamilton Co. v. Mighels, 7 Ohio St. 119; Chambers Co. v. Lee Co., 55 Ala. 537; Heigel v. Wichita Co., 84 Tex. 392. In the last case the court said that counties are not corporations in the fullest sense of that term; they are commonly called *quasi* corporations. They are created by the state for the purposes of government; their functions are political and *administrative*, and their powers are rather duties imposed than privileges granted.

**Laramie Co. v. Albany Co., 92 U. S. 308; State v. Hamilton, 40 Kan. 323; Railroad Co. v. Taylor County, 52 Wis. 86; Chambers Co. v. Lee Co., 55 Ala 534; Duncombe v. Prindle, 12 Iowa, 1.

***"A county is one of the civil divisions of a country for judicial and political purposes, created by the sovereign power of the state of its own will, without the particular solicitation,

This principle being very strictly construed, and much more so than the same principle when applied to cities and villages, or municipal corporations proper. They are allowed to exercise such implied powers as are necessary to the existence or enjoyment of the ones conferred. The extent of the implied powers must be determined from the nature of the corporate existence, and very few implied powers exist in favor of townships and counties.*

The implied powers of administrative corporations are very limited and governed strictly by the purpose of their existence. Hence they are held to have no implied power to borrow money, nor to tax the people for the establishment of some private enterprise, or contract for the benefit of third persons, or offer rewards for the arrest of persons accused of crimes.** But such powers are sometimes given by statute.

---

consent, or concurrent action of the people who inhabit it; a local organization which, for the purpose of civil administration, is invested with certain functions of corporate existence."—Am. & Eng. Encyc. Law (2nd ed.), Vol. 7, p. 900. It is held in England that a county is not a corporation, but rather a convenient division of the kingdom, comprising several *quasi* corporations, such as parishes, hundreds, etc., for judicial and political purposes. But in the United States, though a civil division of the state, it is generally invested by statute with corporate capacity so as to more fully carry out its purposes, though called a *quasi* corporation. *Idem.*

*Wheeler v. Wayne Co., 132 Ill. 599; Evans v. Cumberland Co., 89 N. Car. 157; 92 U. S. 307; 23 Pick. 71; 31 Mich. 25. In the last case it was held that a township had no right to tax the people to maintain a park.

**Jefferson Co. v. Ford, 4 Green (Iowa) 367; 138 U. S.

The power of the legislature to confer upon administrative corporations the right to tax the people for a *quasi* public purpose, as a railroad, has been questioned, but by the weight of authority it is upheld.*

The common law liabilities of administrative corporations as counties and townships are limited, and are not governed by the same principles affecting the liabilities of individuals or other corporations. The principles applicable to torts caused by the negligence of officers and agents of such corporations are modi-

673; 19 Wall. 468; 16 Mich. 253; Lebcher v. Custer Co., 9 Mont. 315; Edwards Co. v. Jennings (Tex. Civ. App.), 33 S. W. Rep. 585; Hawk v. Marion Co., 48 Iowa 472.

*Olcott v. Fondulac County, 16 Wall. 689; Chicot Co. v. Lewis, 103 U. S. 164; Coleman v. Marin County, 50 Cal. 493; People v. Pueblo Co., 2 Colo. 360; Leavenworth R. Co. v. Douglas County, 18 Kans. 169; State v. Sullivan County Ct., 51 Mo. 522; Wood v. Oxford, 97 N. Car. 227. Contra, Salem Case, in 20 Mich. 452; where it was held by Judge Cooley in an able opinion that the legislature had no power to authorize the township to tax the people by majority vote to raise funds for a railroad, as a railway was a private end, and not a public purpose. This case, while justified in many instances in its conclusion, is not supported by the weight of authority.

In Ohio, by constitutional provision, the legislature cannot authorize any county, town or township by vote of the citizens or otherwise, to become a stockholder in any joint stock company, corporation or association whatever, or to raise money for, or loan its credit to, or in aid of any such company. Knox Co. v. Nichols, 14 O. St. 260; 2 O. St. 647.

In many states the question of aiding such enterprises must be submitted to a vote of the people and carried by larger than a majority vote. Colburn v. R. Co., 94 Tenn. 43; 67 Mo. 353; 98 U. S. 169. See Dillon, Munic. Corp., Sec. 157 note.

fied greatly under the common law from those applicable to individuals and municipalities. Their powers are limited, and resulting from this their liabilities are also limited and confined to the purpose of their existence. Thus by the common law, in some states, counties and townships are not held liable for damages resulting from defective bridges. But other states hold there is a common law liability for injuries caused by defective highway. By statute they are also usually made liable for such injuries. Municipalities, on the other hand, are always held liable for damages resulting from neglect to keep the streets in repair. This difference may result from the fact that cities have a more complete control over such matters under their charters than have counties and townships.*

Sec. 1373. COUNTIES.—Counties, as well as towns and school districts, may be constitutional bodies, that is, created or provided for by the state constitution; but more often the power to create new counties is vested in the legislature. It is best to look at the state constitution in each case to see to what extent the administrative corporations are provided for, and what limitations are placed upon the legislature

*School District v. Williams, 38 Ark. 454; Eaton v. Manitowoc, 44 Wis. 489; 4 Mich. 560; Martin v. People, 87 Ill. 524; Russell v. Devon County, 2 T. R. 667; Cones v. Benton Co., 137 Ind. 404; Templeton v. Linn Co., 22 Or. 313; Larkin v. Saginaw Co., 11 Mich. 88; Albrecht v. Queens Co., 84 Hun. 399. Contra, County v. Duckett, 20 Md. 468; Rigony v. Schulykill County, 103 Pa. St. 382.

in regard thereto. Where provided for by the constitution, the legislature cannot deprive them of their corporate powers, or of their right to exist under the constitution of the state.*

Sec. 1374. SAME SUBJECT—THE GOVERNING BODY IN THE COUNTY IS THE BOARD OF COUNTY COMMISSIONERS.—The governing body representing the county consists of a board of elective officers usually designated as the Board of County Commissioners, or Supervisors, and in some states called Auditing Board.

This board has legislative, executive and judicial functions to perform. In its executive functions it acts for the state in providing for the public revenues. In its legislative capacity it equalizes values and apportions taxes to the towns and cities within the county. In its judicial capacity it audits claims against the county.

A question is sometimes raised as to whether or not a county comes within the meaning of a municipal corporation, when that term is used in the statutes providing that certain things shall be done by municipalities. While a county is not technically a municipal corporation, some courts hold that it is included in the term municipal corporation when used

*School Com'rs. v. School Com'rs., 35 Md. 201; People v. Maynard, 15 Mich. 463; State v. Parker, 25 Minn. 215; 23 Minn. 40; Wade v. Richmond, 18 Gratt. (Va.) 583; Reynolds v. Holland, 35 Ark. 56; Adams v. Forsyth, 44 La. Ann. 130.

in a statute or constitution.* Others hold just the contrary.**

Sec. 1375. SAME SUBJECT — GENERAL PRINCIPLES GOVERNING COMMISSIONERS WHEN ACTING AS AN AUDITING BOARD.— The Board of Commissioners or Supervisors, may pass upon any claim that is presented, and in some cases their judgment is final; it is at least *prima facie* conclusive of the correctness of the claims as against the county, if allowed.*** In many of the states provision is made by statute that a claim reduced or disallowed by the Board may be appealed to the courts; and the statutes of some states allow an appeal by the county to the courts.****

The board of commissioners cannot decline to act, or exercise their powers. And a constitutional provision making their award final, does not justify them in allowing claims utterly illegal. In some jurisdictions on refusal to act, the claimant may sue upon his claim at once; in others the board may be compelled to act by mandamus. When a claim is already audit-

---

*39 Ia. 151; 36 Minn. 430; 44 Wis. 489.

**54 Ala. 639; 92 U. S. 307; 28 Mich. 237.

***Gillett v. County, 18 Kan. 410; Com. Ct. v. Moore, 53 Ala. 25; Ryan v. County, 32 Minn. 138.

****Warren Co. v. Gregory, 42 Ind. 32; 32 Minn. 138; Maxwell v. Fulton Co., 119 Ind. 20; Moser v. Boone Co., 91 Ia. 359; 44 Minn. 383; Belmont Co. v. Ziegelhofer, 38 O. St. 523.

In Michigan, by constitutional provision, the award of the board of supervisors on claims against the county is final. Endriss v. Chippewa Co., 43 Mich. 317.

ed, or fixed by law, as by a judgment of a court, its allowance may be compelled by mandamus, and the commissioners have no power to disallow it.* While courts of law define the legislative, executive and judicial functions of all corporations, they will not review the exercise of discretion by a board, when such discretion is exercised within the limits defined and marked out by law.

The boards of commissioners can only do what the law-making power has authorized them to do; hence they cannot establish claims in favor of the county against a township. (55 Mich. 445; 19 Mich. 351.)

We have already seen, that independent of statutory provision, the county is not liable for the negligent acts of its servants; differing in this respect from private corporations. Neither does the doctrine of *respondeat superior* apply to counties, since the relation between a county and its officers is not the same as the relation between master and servant. By statute, if not by the common law, counties are required to keep the public highways in reasonably safe condition, and are made liable for injuries sustained by reason of a failure to do so.** On account of their limited powers, and being agencies of the govern-

*Johnson v. Sacramento Co., 65 Cal. 481; State v. Gloyd, 14 Wash. 5; Rock Island Co. v. U. S., 4 Wall. 435; State v. Blossom, 22 Nev. 71; 84 Hun, 399; Mixer v. Manistee County, 26 Mich. 422; State v. Hamilton Co., 26 Ohio St., 369; 5 Iowa, 380.

**80 Ia. 351; 53 Wis. 200.

ment, counties are not held to guarantee the integrity of their officers, and are not bound to answer for their misconduct. Thus a county treasurer, though having control of the county's moneys, is not held to stand in the same relation to the county, as a cashier of a bank does to the bank. As a rule, it may be said, that in the absence of express statutory provision creating liability, a county is not liable for torts committed by its officers and agents.*

*Hollenbeck v. Winnebago Co., 95 Ill. 148; Askew v. Hale Co., 54 Ala. 639; Hamilton Co. v. Mighels, 7 Ohio St. 109; Kincaid v. Hardin Co., 53 Ia. 430; Vigo Co. v. Daily, 132 Ind. 73; Reed v. Howell Co., 125 Mo. 58; El Paso Co. v. Bish, 18 Colo. 474; Fry v. Albemarle Co., 86 Va. 195; Dougherty Co. v. Kemp, 55 Ga. 252; 40 Mich. 244.

In some states, by statute and otherwise, counties are held liable for damages caused by mobs. Allegheny Co. v. Gibson, 90 Pa. St. 397; Schiellein v. County, 43 Barb. 490; Luke v. County, 52 Ala. 115.

CHAPTER III.

INCORPORATION OF MUNICIPALITIES AND LEGISLATIVE CONTROL.

Sec. 1376. MODES OF CREATING MUNICIPAL CORPORATIONS IN ENGLAND.—In the early history of municipal corporations in England, they were only created by the king's charter, and by special act of parliament, and those corporations which had existed for a long period of time, and whose powers were derived from the fact of immemorial usage, were called corporations by prescription. In 1835 Parliament passed a Municipal Corporation Act to unify the irregular system prevailing as to corporations. This act with amendments was finally enlarged into the Municipal Incorporation Act of 1882, which now prevails, and gives English municipal corporations a uniform character, with powers and modes of administration regulated by the general law, thus abolishing many abuses.

Sec. 1377. CREATION OF MUNICIPAL CORPORATIONS IN THE UNITED STATES.—In the United States, municipal corporation can only be created by legislative act. While such corporations in a few instances exercise powers by prescription (so-called), this simply means that in the absence of positive or direct evidence of legislative creation in such cases, the courts allow this sanction to be shown by long and continued user of corporate powers.

In the United States, municipal corporations may be created in one of four ways: 1. By federal legislation. 2. By state legislation. 3. By prescription. 4. By implication.

1. By Federal Legislation. Congress has been held by the courts to have the power of creating both public and private corporations, whenever such action becomes necessary or appropriate to the effectual exercise of any of the constitutional powers of the federal government; or whenever such action is in any way an aid to the exercise of jurisdiction of the states and territories.* But Congress could not incorporate a municipal corporation within state limits, because within the state in such matter, the legislature is supreme.** Within the territories, and domain under its control it may establish municipal corporations, and does so by vesting the power in the territorial legislatures.***

2. By State Legislation. Municipal corporations, within the states can only be created, or their powers modified, enlarged or restricted by the legislative action of the state. The power to create corporations *inheres* in the states, while the power of Congress to create such corporations must be express, or implied as incidental to express powers; this results from the fact that the state constitutions are limita-

*McCullough v. Maryland, 4 Wheat. 316; Osborne v. Bank, 9 Wheat. 738; Boyd v. Nebraska, 143 U. S. 145.

**14 How. 268; 91 U. S. 545.

***Myers v. Bank, 20 Ohio, 283; Elk Point v. Vaughan, 1 Dak. 113; People v. Butte, 4 Mont. 174.

tions upon the plenary powers of the states, while the federal constitution is a grant of powers not otherwise possessed.

The ancient municipal corporation was not the town, nor the inhabitants of such town or place; but was a grant by the crown to certain persons or classes of persons, who might live elsewhere, as in the case of the American colonies; the corporation therefore being not the people, but consisting of the mayor, the aldermen, and the commonalty, the latter consisting of the freemen entitled to participate in the management of the corporation. By the present English municipal corporation act, and generally in the United States, it is the people of the municipality alone who compose the corporation; the mayor and council instead of being an integral part of it, are but the servant and agents of the corporate entity, or the incorporators and inhabitants.*

3. By Prescription. Municipal corporations may exist by prescription, the state indulging the presumption that corporate powers long used by a town, or school-district, are presumed to have been at one time granted a charter to exist by the proper authority. A few such cases are in existence in the eastern states, but not elsewhere, so that such corporations need be given little attention.**

*Tiedeman, Munic. Corp., Sec. 23; Baumgartner v. Hasty, 100 Ind. 575.

**See 35 Barb. 310, where a school-district which had existed for a long period of years was allowed to exercise corporate powers. 12 Mass. 400; 34 N. H. 351; 82 Ind. 321; 58

4. By Implication. A municipal corporation may be created by implication, that is, without any express words indicating that a corporation is intended. The question as to whether or not a corporation exists must be determined, not by the presence or absence of express words in the incorporating act, but by the express or implied corporate powers conferred.*

Sec. 1378. LEGISLATIVE CONTROL OF MUNICIPALITIES.—While the control over municipalities by the state legislature is generally regarded as complete, and not hampered by the constitutional provision as to impairing the obligation of contracts, as is the case when private corporations are concerned, yet the state's control over municipalities is not altogether unlimited. This limitation may arise from the fact that as to some matters a municipality may own property, or contract rights, which are of a private nature rather than of a public character. "In regard to the powers and property which are vested in a municipal corporation in its public character, as a branch of the state government, there can be no limit to the control of such corporation by the state. But where the municipal corporation, as it always does, by virtue

---

Wis. 324. User of corporate rights for a long period over territory by a municipal corporation, give it a prescriptive right to exercise such powers which will not be questioned by the courts; such exercise of powers being considered as proof of an original grant of authority.

*Dillon, Munic Corp., Sec. 43; 13 Mass. 193. In the last case a corporation authorized to build a school house was held to have corporate powers to contract for such a building.

of its existence as a legal personality, acquires the rights of property of a private character for the benefit of the community which has been incorporated, and in the enjoyment of which the state at large is not concerned, these proprietary rights constitute in the constitutional sense vested rights, if not of the municipal corporation itself, yet of the community which has been organized which cannot be taken or diverted by legislative action. In respect to these semi-private rights the legislative control is not unlimited."*

As to the right of the state legislature to compel the municipality to assume contractual obligations, there is some conflict of authority. In Michigan it has been held that the legislature had no authority to compel the city of Detroit to purchase and provide for the maintenance of a public park, of purely local concern, without its consent.** But if the purpose for which the contract or debt is to be incurred is of a strictly public character, as the building of a bridge over navigable waters, repairing the streets and highways, constructing the Brooklyn bridge, and the like, the legislature may compel the municipality to incur the debt, or may appoint its own agents to do the work and as-

*Tiedeman, Munic. Corp., Sec. 9; citing, Downing v. Indianapolis, etc. Co., 151 Mass. 364; Reading v. Commonwealth, 11 Pa. St. 196; People v. Ingersoll, 58 N. Y. 1; Water Works v. Niles, 59 Mich. 311; College v. Cleveland, 12 Ohio St. 375; Cummings v. City of St. Louis, 90 Mo. 259.

**People v. Common Council, 28 Mich. 228, 15 Am. Rep. 202; People v. Chicago, 51 Ill. 17; Philadelphia v. Field, 58 Pa. St. 30; Darlington v. Mayor, 31 N. Y. 164; 129 N. Y. 308.

sess the cost to the corporation.* But the legislature could not compel the municipality, without its consent, to create a debt in aid of the construction of a railway.**

In a number of cases state legislatures have exercised the power to compel cities to recognize and perform obligations which have no binding force in law, but only a moral claim for satisfaction, and this power has been upheld by the courts.*** But a limit to this power has been made in that the legislature cannot compel the city to pay a claim unconstitutional, in that it exceeds the limit of municipal indebtedness; but such a limitation in the statutes is considered as waived by the legislature when it requires the city to pay the claim.****

So the legislature may validate an assessment of the city which is void for a failure to satisfy some special requirement of the state statute; since, as a rule, whatever the legislature could have permitted to be done, it may subsequently ratify and give it legal effect.*****

---

*Carter v. Bridge Co., 104 Mass. 236; Kirkwood v. Newberry, 125 N. Y. 571; People v. Supervisors, 112 N. Y. 585; 5 Neb. 136.

**People v. Batheller, 53 N. Y. 128.

***People v. Squire, 145 U. S. 175; Grogan v. San Francisco, 18 Cal. 590; People v. Supervisors, 70 N. Y. 228; Nevada v. Hampton, 13 Nev. 441.

****Mosher v. School Dist., 44 Ia. 122; In re Flower, 29 N. E. Rep. 463; Creighton v. San Francisco, 42 Cal. 446, 95 U. S. 644.

*****Lennon v. N. Y., 55 N. Y. 361; Baltimore v. Horn, 26

As to the power of the state legislature over municipal offices and officers, it may be stated as a rule, that the state has authority over all such officers who are charged with duties of a strictly public character and which the state has an interest, as judges, and all such as have to do with the administration of justice, while those engaged in peculiarly municipal affairs as in the management of gas, water and sewer, and the like matters, the state cannot interfere with, or direct their appointment.*

Md. 194; Lockhart v. Troy, 48 Ala. 579; Bolles v. Bromfield, 116 U. S. 364; R. R. Co. v. Maquillon, 12 Kan. 301.

*"While an extensive and very comprehensive discretion is vested in the legislative power of the state, in shaping the general features and outlines of local municipal government, subject only to the existing constitutional limitations and restraints, it is, nevertheless, a deeply rooted principle of English and American law that the ultimate control of purely local affairs must be vested in the local governments of towns, cities and counties, and should be administered by officers chosen by their inhabitants. And so, also, while the legislature has no power to appoint, it has the power to prescribe how the act of appointment shall be performed and, generally, to create new offices, abolish those already existing, and regulate by re-distribution that portion of the sovereign power which is administered by executive public officials; and, in exchanging an old system of administration for a new one, or in creating a system of local government, the legislative may make provisional appointments." Tiedeman. Munic. Corp., Sec. 18. Citing, Atty. Gen. v. Detroit, 29 Mich. 108; 24 Mich. 44; 15 N. Y. 532; Atty. Gen. v. Twombly, 89 Mich. 50; People v. Morgan, 90 Ill. 558; Com. v. Denworth, 145 Pa. St. 172; Brady v. West, 50 Miss. 68; State v. Covington, 29 Ohio St. 102; State v. Smith, 92 Neb. ——; People v. Porter, 90 N. Y. 68; State v. Benedict, 15 Minn. 198.

CHAPTER IV.

MUNICIPAL CHARTERS, THEIR POWERS, NATURE, CONSTRUCTION AND LIMITATIONS.

Sec. 1379. TYPES OF MUNICIPAL CHARTERS.—There are several kinds or types of municipal charters, classified as follows:—1. Charters by special enactment. 2. Charters under a general law. 3. Charters under judicial sanction.

1. Charters by Special Act. By this is meant that the state passes a special act or law for each municipal corporation, granting a particular charter to a named city. This was formerly the usual method of creating such corporations, but has been largely superseded in most states and in England by general laws for the organization of municipalities.

2. Charters Under a General Law. The state passes a general law providing for the organization, powers and control of municipalities of the various classes throughout the state.

3. By Judicial Sanction. As where the legislature provides that cities may be organized by petition to the courts. The real authority comes from the state, and the court simply acts in giving its sanction as indicated by the state.

Sec. 1380. METHODS OF CLASSIFYING CITIES WHEN INCORPORATED UNDER GENERAL LAWS.—The organization of counties and townships, and the like, by general law is easily

done, but the incorporation of cities in the same way becomes a more difficult question by reason of the fact that all cities are not of the same size, situation and environment, and requiring the same form of a charter and charter powers.

Many of the states classify cities according to the number of inhabitants in the incorporated territory; and not according to local conditions that are often important factors in determining the best form of government for the municipality.

Where cities are classified according to the number of inhabitants, they are usually divided into three classes (or more in some cases) and the powers of each class is then defined by the general law. Thus a general law is passed providing that all cities of a certain number of inhabitants shall be cities of the *first class;* and all cities of the next lower fixed number of inhabitants shall be cities of the *second class;* and so on, through the different classes of cities. Having thus classified the cities, the general law then provides the special powers to be exercised by each separate class of cities. The objection to this classification is chiefly on the ground of its rigidity, giving to cities dissimilarly situated the same powers simply because they possess the same number of inhabitants. Thus one city may have harbors and wharves, and the other none, and yet each will be given the same charter powers to regulate them. In Ohio, it was attempted to get around this rigidity by such a diverse classification as to make the classification apply to each city,

fixing the number of inhabitants at the precise number possessed by a certain city at a special census. This scheme was declared unconstitutional, as constituting special legislation, and an entirely new plan had to be devised, conforming to the constitutional requirements.*

In Massachusetts it is provided that the legislature may charter cities of over twelve thousand inhabitants. While in Missouri and California it is provided that a city having more than one hundred thousand inhabitants may frame its own charter. This is rather unusual. (1 Beach, Pub. Corp. Secs 41 and 42.)

The incorporation of municipalities by general law is now the rule, and the legislature may impose such charters upon corporations already existing, and without their consent. Although political considerations usually require a legislature to get the consent of a municipality to the change of its charter.

Other states provide that cities already incorporated may come under the general law if they elect

*"Sec. 1. All municipal corporations, which, at the last federal census had a population of five thousand or more, shall be cities. All other municipal corporations shall be villages. All cities which, at any future federal census, have a population of less than five thousand shall become villages. All villages which, at any future federal census, have a population of five thousand or more, shall become cities." Ohio Municipal Code, as passed in 1902, 96 Ohio Laws, 20. The code then enumerates the powers of the cities, and prescribes minutely for the municipal government, election of officers and boards, etc. The constitution forbids the granting of special charters. 12 Ohio St. 124.

to do so; that is, the classification of cities is made by general law, and it then provided that any city may come under the general law and surrender its special charter by electing to do so in the manner prescribed by the statute.*

A municipal charter cannot be impaired contrary to and in violation of the state constitution. And in several states special municipal charters cannot be granted by constitutional provision.** In some states the constitutional provision prohibits the legislature from passing any special act conferring corporate powers. This was aimed at private corporations, but is held to apply to municipal corporations also, except in New Jersey.***

The question arises whether the constitutional limitation as to creating corporations, or municipal corporations, by general law only, applies to counties, school-districts, and the like, and by some authorities it is held that it does not, as they are not within the meaning of such terms.****

Sec. 1381. CHARTERS UNDER JUDICIAL SANCTION CONSIDERED.—These are frequently classified as *court* corporations, but they are really corporations under judicial sanction, as courts have not the power to create corporations. They result from the

---

*20 Ia. 145; 78 Ill. 548; 74 Wis. 610; 40 N. J. Law, 550.

**54 Mo. 458; 51 Ill. 37.

***40 N. J. Law, 550; 12 Ohio St. 124; 1 Beach, Munic. Corp., Sec. 41.

****81 Cal. 489; 43 Ala. 598; 51 Ill. 37.

provision sometimes made by the legislature that a municipality may be incorporated by a petition addressed to a court, which has been given power by the legislature to sanction such incorporation. The method followed is usually for electors of the territory to be incorporated to join in a petition to the proper court. Then commissioners are appointed to hold an election, to get the will of the people on the matter. The question has arisen, if this giving the court permission to sanction incorporation is not an unauthorized delegation of legislative power, and the question has been answered both ways by the courts.*

The legislature also may give the courts power to enlarge the territorial limits of an incorporated city. The metes and bounds of the city are definitely stated in the charter, and the authority of the legislature in some way is necessary to their being changed.

We have seen in the preceding chapter that cities are creatures of the law-making power, and that their charter confers no vested rights which the legislature cannot take away. But private rights, or obligations incurred, are not affected by an amendment or repeal of a municipal charter.**

---

*That such delegation is authorized, see 45 N. W. Rep. 103; 10 Colo. 552; that it is not, see 38 Ark. 81; 29 Am. & Eng. Corp. Cas. 22.

**111 N. Y. 1; in this case a franchise given to a street railway company by New York, imposing no limitations, was held not to be affected by the legislature repealing the charter under which the franchise was granted by the city. The rights of the bondholders were to be protected.

Sec. 1382. METHODS OF PROVING MUNICIPAL CHARTERS.—Private corporations, when compelled to prove their charter do so by certified copies of the records, unless it is by special act, when the act is proven. The existence of the charter and incorporation are usually admitted.

The primary evidence of a municipal charter is the duly authenticated copy of the legislative enactment. But such proof is seldom necessary as secondary evidence is made competent to prove the charter. Again, courts take judicial notice of the charters of municipal corporations, and this is so whether they be incorporated under a general law or under special acts. The courts will not notice a special act of the legislature creating a private corporation, but will do so if the special act creates a municipal corporation, since the act constitutes a public law.* When there is no written evidence of a charter granting corporate power, secondary evidence of user may be received; that is, prescriptive evidence is competent.**

Sec. 1383. PROOF OF CITY ORDINANCES.—It is seldom necessary to prove the municipal charter as the courts take judicial notice of it, but the municipal or city ordinances must be proved. They are strictly construed, and may be regarded as the statute law of the city.*** Some states provide that the courts shall take judicial notice of city ordinances, but this is

*60 Ala. 486; 108 Ill. 70.
**1 Dillon, Munic. Corp., Sec. 84.
***36 Ia. 291; 17 Wend. 199

uncommon.* In proving a city ordinance it is necsary to show not only that it was passed, but that it was regularly and properly passed as provided by law; then proof must be given of its being properly published as required by law, so that the matter becomes quite irksome sometimes. A more expeditious way of proving city ordinances is sometimes provided by statute, authorizing the printed book of the codified ordinances of the city to be admissible as *prima facie* evidence that the ordinance was duly passed.

Sec. 1384. CANONS OF CONSTRUCTION OF CITY CHARTERS.—The charter of a municipality must be strictly construed in favor of the state and against the city, since the charter is simply a grant of powers to the municipality from the state. In other matters the rule is to construe a grant freely against the grantor, but not as against the king's grant, and the state or sovereign power is given the same consideration as the king at common law.**

The municipality can exercise only such powers as are actually conferred, or necessary or fairly implied as incident to the express powers, or those which are indispensable to the accomplishment of the purpose of corporate existence.*** Hence the implied powers are said to be of two kinds: 1. Those implied from the express powers conferred, this being the one usually

*24 Ala. 112.

**Minturn v. Larue, 23 How. 435; 54 Ia. 193.

***Dillon, Munic. Corp., Sec. 89; Ottawa v. Carey, 108 U. S. 110; Ravenna v. Pa. Co., 45 Ohio St. 118; Heiskell v. Baltimore, 65 Md. 125; Richmond v. McGirr, 78 Ind. 192.

considered;* and 2. Those implied from the corporate purpose indicated by the charter.**

A municipal charter, while being strictly construed in favor of the state, should be so construed as to permit the city to carry into effect every power expressly conferred.***

As to taxation, the legislature as a rule fixes the limits of the cities' power to tax, and within that limit the city may exercise its discretion in the expenditure of money for public purposes. (1 Beach, Sec. 77, 20 Mo. 136.)

The powers conferred by the legislature upon the city to be exercised by its common council, cannot be delegated by the council to committees, they must exercise the powers as a body.**** So the common coun-

*New London v. Brainard, 22 Conn. 552; Leconteulx v. Buffalo, 33 N. Y. 333; 7 Ohio St. 100; Green v. Cape May, 41 N. J. Law, 45. In the Connecticut case, the common council undertook to appropriate money for fireworks for the Fourth of July, and their action was held void for want of authority to make such an appropriation, there being no such implied power in the city. Likewise a city has no implied power to appropriate money to be spent in securing the passage of an act through Congress for the benefit of the city.

**Torrent v. Muskegon, 47 Mich. 115; where the city of Muskegon was held to have the implied power to build a city hall to house its fire department, which it had express power to equip and control.

***Union Pac. R. R. Co. v. Ryan, 2 Wyo. 408; 113 U. S. 516; 7 Ind. 86; 15 Conn. 175; Harris v. Intendant, 28 Ala. 577. Thus if there is a grant to a city to levy and collect taxes, or erect buildings, it will be considered that the city has the incidental power to employ the usual and proper machinery to carry out the express powers.

****63 Ind. 155; 73 N. Y. 73.

cil cannot delegate to the mayor of the city their power in regard to paving the streets.* Nor to the city engineer the power to determine the size of sewer pipes to be used; nor to a committee the power to provide and erect lamps for lighting the streets.** The rule simply means, that where the legislature has conferred a power upon the council, the council cannot delegate this power to an individual or a committee. But the rule is quite often violated. The appointment of a committee to investigate a matter and report to the council, and then action by the council in conformity to the report is not objectionable under this rule.

Neither can the city by contract, or otherwise, sell or surrender its legislative powers. This is often attempted by the city by means of giving an exclusive contract or franchise to street car and telephone and other like companies. The city cannot grant an exclusive franchise and thus prevent a subsequent council from having control over the matter, unless the legislature has conferred upon it express power so to do.***

---

*46 Mo. 100.

**43 Mo. 395; 36 Minn. 59.

***59 N. Y. 228; 36 N. J. Law, 198; 23 Mich. 344. These cases holding that a contract with a gas company for lighting a city for a period of ten years, though made by the city with power from the legislature, was annulled by a repeal of the law giving the power to the city; and a contract with an individual to operate a market place for the period of ten years was held not binding upon a subsequent council.

In the construction of the charter as a whole, municipal charters are made up of two kinds of provisions: 1. Mandatory. 2. Discretionary.

In determining whether a provision is mandatory or discretionary, no satisfactory result can be derived from a literal interpretation of the words "may", or "shall", or "must". It is the spirit of the charter and the purpose of the corporation that must govern. "Must" may mean "may", and "may" may mean "must", or either one may mean "shall".*

If the charter provisions involves directly the exercise of legislative corporate powers, or the public or an individual has a special interest in having an act done, and the city is vested with power to do this act, and has adequate means for promptly and properly performing it, the duty will be held to be mandatory, although the word "may" and not "must" is used in the statute.** While if the charter provision involves simply administrative action, and third persons or the public are not particularly interested, it is usually regarded as discretionary.***

*Spears v. Mayor, 72 N. Y. 442; Merrill v. Shaw, 5 Minn. 148; contra, 75 N. Y. 38.

**Phelps v. Hawley, 52 N. Y. 53; Veasie v. China, 50 Me. 518; Seines v. Franklin Co., 48 Mo. 167; Vason v. Augusta, 38 Ga. 542.

***Atty. Gen. v. Locke, 3 Atk. 164; Joliet v. Verley, 35 Ill. 58; Grant v. Erie, 69 Pa. St. 429; 39 Mo. 485. The expression "hereby authorize" in a statute has been held to create a mandatory duty. 38 Ga. 542. See Dillon, Munic. Corp. Sec. 98; 9 How. 248; 4 Neb. 336.

Sec. 1385. CHARTER POWERS ARE GENERAL AND SPECIAL.—The charter powers conferred upon a municipality may be classified as *general* and *special.* General powers being those essential to the existence of the corporation; and special powers those intended to assist the municipality in carrying out its purpose of local self-government, and providing for the health, convenience and welfare of the inhabitants. We will first take up the special powers as conferred upon municipalities.

Sec. 1386. SPECIAL CHARTER POWERS—AS TO PARKS AND PUBLIC SQUARES.—One of the special powers usually conferred upon a municipality is the control of public parks and squares. The object of their establishment is for the health and pleasure of the inhabitants. They are a matter of purely local concern, such that the legislature cannot force them upon the municipality without its consent. (28 Mich. 228; 1 Dillon, Munic. Corp., Sec. 73.)

In the exercise of its power in providing for and controlling its parks, a city may, under legislative authorization, condemn lands under the power of eminent domain, to establish parks and squares in the city. Although it has been contended that the power of eminent domain did not extend to such a purpose, on the ground that a park was not a public purpose. It has been held that private property may be taken for ornamental purposes, on the ground that ornamental purposes, as regards parks, are equivalent to useful pur-

poses.* And the legislature may authorize a city to condemn lands outside of the city limits for park purposes, but may not authorize a special assessment by the city on adjoining lands to pay for the expense of such lands.** As a rule the city has no power to act outside of its territorial limits.

A city, where that is the case, owns and controls the parks outside the city limits, as a private corporation, and not as an agency in government. In regard to them it may have semi-private rights, with the attendant consequences of such rights being beyond the control of the legislature and under the protection of the constitutional provision as to the impairing the obligation of contracts, which consequences do not attach to its usual governmental functions. (44 Mich. 602.)

Land once dedicated to a public park or square, cannot be diverted from this use by the city to the injury of adjacent land owners, who have purchased since the dedication. Adjacent land owners who purchase and build with reference to the park or square and in reliance on its being used for that purpose, have a vested right to have such square or park opened and maintained.*** As to the use which a public square may be put, while it is usually permissible to

*51 Ill. 57; 45 N. Y. 234; 11 Allen, 530; 2 Dillon, Munic. Corp., Sec. 599.

**54 Mo. 458; 58 Mo. 175.

***Laughlin v. Washington, 63 Iowa, 652; Archer v. Calinas, 93 Cal. 43; Prince v. Plainfield, 40 N. J. L. 608; 3 Vt. 526; 38 Mo. 315; 77 Ill. 325.

erect county or state public buildings, and the like governmental structures, or maintain hitching posts and standing room for farmers' horses, on public squares;* this has been denied, and the courts have enjoined the erection of public buildings as a city hall, and prevented the use of the public square except as a place of public and common amusement.**

It is also held that the abutting property owners may enjoin the laying out of a street through a public park, or the laying of a railroad on a street within the park.*** Other authorities hold that a street may be established through a park without interfering with the donation of the park to public purposes.****

Sec. 1387. SAME SUBJECT — AS TO WHARVES AND DOCKS.—As most large cities are located on or near navigable water, they have use

---

*San Antonio v. Steinberg (Tex.), 7 S. W. Rep. 754; Langley v. Gallipolis, 2 Ohio St. 107; Com. v. Bowman, 3 Pa. St. 202; Frederick Co. v. Winchester (Va.), 5 S. E. Rep. 884. A public library has been allowed to be erected in the square. Riggs v. Detroit B. of Ed., 27 Mich. 262. The matter is said to be in all cases, a question dependent upon the laws or customs of the local community or state in which the question arises. Baker v. Johnston, 21 Mich. 319; Baird v. Rice, 63 Pa. St. 489.

**Princeville v. Auten, 77 Ill. 325; New Orleans v. U. S. 10 Pet. 661; State v. Woodward, 23 Vt. 92; People v. Carpenter, 1 Mich. 273; 54 Conn. 244.

***Price v. Thompson, 38 Mo. 363; 19 Hun. 30; Jacksonville v. Railway, 67 Ill. 540.

****Cohn v. Parcels, 72 Cal. 367. See Crawford v. R. R. Co., 67 Ga. 405, where a depot was allowed to be established on the commons of the town.

for wharves and docks. The legislature usually confers power upon the city to control the wharves, and even construct wharves and docks.

A wharf is any structure, however simple, to which a vessel may anchor and lie alongside. Thus the end of a paved street may constitute a wharf, within the meaning of the city charter. (45 Ia. 196.)

There is considerable technical law applicable to wharves, and they are regarded as of four kinds in legislation upon the subject: 1. Private wharves. 2. Quasi public wharves. 3. Municipal wharves. 4. Federal wharves.

1. By a private wharf is meant one that is owned by an individual, as where the owner of lands adjoining navigable water places a wharf on the water's edge for his own convenience. The obligation of the owner of such a wharf are different from those imposed upon the owners of quasi-public wharves.

2. Quasi-Public Wharves. Quasi public wharves are those which are held out to be used by the public, though owned by individuals or companies. (1 Dillon, Munic. Corp., Sec. 104; 115 Ill. 155.)

3. Municipal Wharves. Municipal wharves are those owned by the municipality. Cities are frequently allowed by their charters to construct and own, as well as control wharves, and such wharves as are owned by the city are known as municipal wharves.

4. Federal Wharves. Federal wharves are those erected by the federal government at public expense.

Sec. 1388. SAME SUBJECT—POWER OF THE CITY TO MAINTAIN AND CONTROL WHARVES.—It is held that a city under general wharfage powers may erect and maintain a wharf at the end of a public street, and charge wharfage fees.* The collection of wharfage dues does not violate any provision of the federal constitution as to regulating commerce.** But the imposition of a duty on interstate tonnage would be unconstitutional, while the charge of a reasonable amount for the use of a wharf is not objectionable.***

The city may be authorized to exercise the power of eminent domain, for the purpose of establishing wharves and docks. They are allowed to condemn private property, making just compensation for the establishment of a municipal wharf, since such purpose is regarded as a public one.

But the state has authority to deprive a city of its right to collect wharfage rates, since the right to erect and maintain wharves by a municipality is not regarded as a vested right, but is one of those franchises given by the legislature to the city, with full power in the state to modify or take away at any time.****

---

*105 U. S. 166; 49 Mich. 110.

**2 Wall. 250.

***20 Wall. 577.

****105 U. S. 166. In this case the state of Louisiana had authorized the city of New Orleans to build wharves and levees on the Mississippi river and charge wharfage fees. The wharves were built at great expense by the city and were

Municipal wharves obligate the city maintaining them, to use ordinary care and diligence to keep them in reasonable and ordinary repair; and if injury results from a failure so to do the city becomes liable in damages to the injured party. They are not held to be insurers of the safety of the wharves; provided they are not guilty of negligence in the erection or maintenance of the wharves they will not be liable.*

Riparian owners, that is, the owners of the land adjoining navigable waters, have the right to erect wharves and charge wharfage for the use of their wharves. A municipality as a riparian owner has the same rights, and it is said that when it erects wharves as a riparian owner, it acts as an individual proprietor and not as a city, and that its semi-private rights as to such wharves could not be taken away by the legislature, as in other cases, but this is doubtful law.**

A city's charter over wharves does not extend to authorize it to destroy, or impose burdens on private wharves or docks; and cannot authorize the abatement of a private wharf as a nuisance. The question as to what constitutes a nuisance is a judicial and not a leg-

in operation, when the state authorized a railway company to lay its tracks alongside of the wharves and to make use of them free of charge. The federal supreme court held that the state could do this since both purposes were public, and that the city had no vested right to municipal wharves. Contra, 30 La. Ann. 190.

*118 Pa. St. 490; 36 N. H. 284.

**1 Dillon, Munic. Corp, Sec. 109; 31 Calif. 34; 11 N. Y. 115.

islative one, it must be left to the courts to decide.* While the city may exercise its discretion as to the rates for wharfage, this power is subject to the limitation that such rates must not be unreasonable.**

Sec. 1389. SAME SUBJECT—FERRY FRANCHISES.—Another special power usually conferred upon large cities having navigable waters, is the power to control ferries, known as ferry franchises. The grant is in the nature of a public law, and as such may be repealed or amended at the will of the legislature, though it causes a loss of property to the city.*** The city cannot confer an exclusive franchise unless it has express power so to do from the legislature.****

As to what will constitute a grant of exclusive power to the city to control ferries, it has been held that a permission to grant or refuse licenses is exclusive. (48 Ia. 133; 45 Ill. 90.)

The city may provide for licensing ferries, and charge license fees, and this will not be invalid as a regulation of commerce.*****

Sec. 1390. SAME SUBJECT—AS TO PROVIDING FOR THE PUBLIC HEALTH.—Another subject of special powers customarily bestowed upon cities is that of the care and preservation of the public health. This is generally provided for in two ways:

*18 Ohio St. 94; 32 Ind. 85; 10 Wall. 492.
**112 Ind. 15; 1 Dillon, Munic. Corp., Sec. 112.
***10 How. 511; 11 Pet. 420.
****23 How. 435.
*****11 Mich. 43; 44 N. J. Law, 118; 11 Mich. 347.

1. By state regulations. 2. By municipal ordinances and regulations.

The more usual way is by state regulations, providing for the general methods of safeguarding the public health, establishing quarantine regulations, and the like methods of fighting disease. These regulations are to be enforced by the municipality through the boards of health, along with such other local regulations as may be necessary or suitable to the particular situation. In all large cities, and by statute in many states, a board of health is provided for under municipal authority, with powers to enforce such sanitary regulations as they may deem necessary to the public health in the city, keeping within the general regulations provided by the state.

The power to pass ordinances looking to the sanitary condition and preservation of the public health is usually conferred upon the municipality by the legislature in general terms. This power is liberally construed on behalf of the city, in the interests of the public.* Power to regulate sanitary matters and provide for the public health involves the right to establish quarantine regulations to any extent necessary to accomplish the object intended. Under this power the city has authority to provide for the removal of dead

*1 Gill (Md.) 364. Charter powers are usually conferred either in special terms or general terms, and powers conferred in general terms are usually more liberally construed than those conferred in special terms.

bodies and other objectionable matter from the streets.*

Sec. 1391. SAME SUBJECT—AS TO PUBLIC MARKETS.—At common law the right to hold a public market was a franchise granted by the king to certain towns or places; and by the common law, certain of these markets, on specified days or occasions were regarded as market's *Overt,* giving the purchaser at them an indisputable title to the things bought. They were of such importance in the early days in England that a special court, called the court of *pied poudre,* was established for the markets or fairs, at which a case could be brought, tried and judgment rendered all in one day.**

In America the power to establish and regulate markets is generally conferred upon cities in their charter. (1 Dillon Munic. Corp., Sec. 380.)

The power to provide for the establishment and regulation of a city or municipal market involves the following things: 1. A public place for the purchase and sale of articles of daily consumption. 2. Convenient fixtures. 3. Suitable police regulations.***

---

*1 Dillon, Munic. Corp., Sec. 145; 84 Ky. 290.

**3 Bl. Com. 32; 5 Coke, 83.

***Cincinnati v. Buckingham, 12 Ohio, 257. In this case it was said that the police regulations included the fixing of market hours, making provision for lighting, cleaning, watching, detecting false weights, and unwholesome food, and other arrangements calculated to facilitate the intercourse, and insure the honesty of buyer and seller, with proper officers to preserve order and enforce obedience to rules.

The power to establish and regulate public markets is conferred in general terms, and is liberally construed. So that a city having general authority to manage its business affairs, may appropriate money for a market house, though not expressly authorized. Unless it is the intent of the legislature to specifically enumerate and specialize the powers conferred, a charter power granted in general terms will be liberally construed.* The power to promote the general welfare and preserve the peace of the town involves authority to regulate a public market.**

A public market having been established, the city may prohibit the hawking or peddling of goods by private individuals.*** But this does not involve the power to prohibit the vending of articles at the regular place of business of the individual.**** The city may prevent the vending of articles in a public place, within certain limits, so as to protect the city market. Thus where the city market rents stalls for the sale of meat, it may prevent the sale of meat near the market house so as to prevent too much competition.***** The city may not delegate its control over a city market to an individual; but while it cannot turn the entire control of the market over to a private individual,

---

*23 Pick. 71; 11 Ohio St. 550.

**33 Pa. St. 202.

***11 Rich. (S. C.) 551; 10 Bush (Ky.) 64.

****33 Ill. 416; 46 Ill. 489.

*****10 Wend. 100; 8 Johns. 418.

yet it may rent stalls to individuals.* And the city may prohibit persons from occupying the streets with stands or tables for the sale or exhibition of goods.

It is held that the police power of the city implies a power to regulate markets.**

Sec. 1392. SAME SUBJECT—AS TO THE CITIES' POWER TO ESTABLISH AND MAINTAIN FIRE DEPARTMENTS TO SUPPRESS FIRES.—The power to establish and maintain a fire department for the suppression of fires and the protection of the homes and property of its inhabitants is another special power usually conferred upon cities.

Under such a power the municipality has authority to pass ordinances establishing fire limits, that is, districts in which nothing but brick or stone structures may be erected, and make other specifications in regard to the construction of buildings for the prevention of fires.*** In the extinguishment of a fire a city has plenary power; it may destroy buildings to prevent the spread of fires, and this right was recognized by the common law, being regarded as a matter of necessity.**** As a rule there is no liability on the part of a city for loss arising from tearing down buildings to prevent the spread of fires. But some states have

---

*7 Ia. 102; 1 Dillon, Munic. Corp., Sec. 385. But see 13 Ia. 210.

**1 Dillon, Munic. Corp., Sec. 169; Cooley, Const. Lim. 596.

***11 Mich. 425; 7 Cow. 349.

****12 Cal. 63; 101 U. S. 16.

provided a statutory liability on the part of the city in case buildings have to be torn down.*

The municipality is not liable for the negligent acts of its servants in the fire department.** This is also true of the servants and officers of the city in charge of the enforcement of sanitary and health regulations. Since a city in protecting the health and property of its inhabitants under charter from the state, is performing duties of a purely public character, and is not held responsible for the misconduct of its agents or officials.*** Neither is a city held liable for injuries to a fireman resulting from defective machinery.****

Sec. 1393. SAME SUBJECT—AS TO WATER SUPPLY FOR CITY.—Another important special power conferred on cities relates to supplying its inhabitants with water. Though it is held that under the general welfare clause, that is, the general power to provide for the welfare of its inhabitants, the city has authority to contract for the establishment of water works, and is not dependent for this authority on any special provision in the charter.*****

The water for a municipality may be furnished in one of three ways: 1. By the municipality, owning the waterworks system. 2. By chartered companies or

*8 Met. 462; 101 U. S. 16.

**76 N. Y. 506; 120 Pa. St. 624.

***Summers v. Daviess Co., 103 Ind. 262; Ogg v. Lansing, 35 Ia. 495; Dargan v. Mobile, 31 Ala. 469; Barbour v. Ellsworth, 67 Me. 294.

****47 N. J. Law, 406.

*****39 N. J. Eq. 367; 28 Ga. 50.

corporations, the city renting a specified number of hydrants and paying a fixed sum for the use of water for public purposes. 3. By private individuals.

In supplying the city with water, a municipality has no right to divert the water from a stream to the injury of riparian owners.* But under the power of eminent domain, a city may be authorized to so divert water for public purposes.**

It has been held that the use of the public streets for water pipes or mains, is not an extra servitude, entitling the abutting owner to additional compensation when the streets are so used. But the use of a country road for water mains has been held to constitute an additional servitude.***

With the consent of the legislature, the city may grant exclusive rights in the public streets to a company for laying its water mains.**** The municipality will not be held liable for disease contracted from supplying impure water.***** But a private company may be liable for damages in such cases, since they operate the water plant for the purpose of private gain, and are held to the same rule of care and diligence as in other matters.******

Sec. 1394. SAME SUBJECT—AS TO PUBLIC LIGHTING.—The furnishing of lights with which to

---

*24 Ala. 130; 65 Pa. St. 444.
**4 Gray, 500.
***27 N. J. Eq. 552; 2 Dillon, Munic. Corp., Sec. 697.
****2 Dillon, Munic. Corp., Sec. 691.
*****11 Ex. 781.
******11 Ex. 781.

light the streets and public places of the city is a power now usually conferred upon municipalities. Public lighting is one of the important functions of the city government, and involves many legal problems which are being worked out. The ownership of the lighting plant, whether gas or electric, may, like that of a water system, be in the city, or in a private company or corporation. But public ownership is more common in case of water plants than lighting plants.

The city has no authority to supply gas for lighting, unless the power is conferred in its charter. The municipality has implied power to contract for lighting the city.*

The city's ownership of gas works is in its private character, and as regards such property would have rights that could not be taken away by the legislature, and is liable for negligence in the management of such property by which injury is caused. (1 Dillon, Munic. Corp., Sec. 72.)

With legislative authority a city may give a private corporation the exclusive right to the use of its streets for gas mains. But such exclusive rights cannot be conferred by the city except upon legislative authority. An exclusive contract, when properly granted, is held to be a valid contract and protected from impairment by the federal constitution.**

*66 Ind. 396.

**1 Dillon, Munic. Corp., Sec. 691; 150 U. S. 650. Contra, 25 Conn. 19. The validity of an exclusive contract or franchise of this character, seems to be justly questioned on the ground that it not only tends to, but does actually, create a

It is held that an exclusive franchise to occupy the streets for gas mains does not prevent the use of the streets for electric light wires.

It is within the power of the city to regulate by ordinance the price of gas; and the same principle would give it power to regulate the charges for electric lighting. This power is something of an offset to the monopolizing tendencies of public service corporations. The power to regulate such charges is largely nullified as yet by decisions requiring such regulation of prices to be reasonable and not confiscatory; which limitation, though it sounds well, in practice enables a corporation supplying such commodity to obtain large dividends on watered stock.

It is also held that a gas company, in the absence of a contract with the city to do so, is not obliged to furnish gas to every one along its lines.* But this may be questioned, and it would seem that a company setting out to supply the public with such a commodity would be compellable to supply all who were able to pay for the commodity, if they conformed to the requirements of the company. In the control of gas and water works as owner, a municipality may become liable for the negligence of its officers and agents in fail-

---

monopoly. In England this monopolizing of public lighting, as well as other municipal industries, is prevented by municipally owned enterprises; and the same plan is being advocated in many of our important cities, and will unquestionably become general in the near future.

*2 N. J. Law, 245.

ing to supply sufficient gas or water to fill accepted contracts.*

A city is not obliged to light its streets, unless some charter provision requires it. Though as a rule for its own benefit it does light its streets, but it is under no obligation to do so.** It is required to light and guard excavations or any dangerous obstruction in the public streets, and will be liable in damages to any one injured for a failure to do so.***

The public streets of a municipality cannot be used by electric lighting companies without legislative sanction. And the right of abutting owners to compensation for such use of the streets on the ground that it is an additional servitude is in dispute. The weight of authority perhaps being that such owners are not entitled to compensation.

Sec. 1395. SAME SUBJECT—AS TO THE SUPPRESSION AND PREVENTION OF NUISANCES.—A municipality is usually given the power to suppress and prevent nuisances. A nuisance may be defined as a *continuing* annoyance to the prejudice of one's legal rights. Nuisances are of two kinds: 1. Public. 2. Private.

1. Public Nuisance. A public nuisance is a continuing annoyance to the public. While a private nuisance affects only private individuals, with which the city has nothing to do.

---

*120 Mass. 324; 149 Mass. 410; 81 Pa. St. 38.
**38 Minn. 134; 100 Mass. 255.
***98 N. Y. 679.

Public nuisances are of two kinds: 1. Nuisances *per se,* that is, the mere fact of their existence shows them to be nuisances. 2. Nuisances in fact, that is, such things as have been judicially determined to be nuisances. The city has authority to abate nuisances by ordinance or resolution, or it may bring proceedings to determine whether a nuisance exists and if so have it abated by judicial decree.*

The legislature may invest a city with the power to abate a nuisance *per se,* without providing for a judicial determination. And it is perhaps impliedly within the power of a city to clear its streets of nuisances, subject to its being answerable for an abuse of the power.** The power to abate a nuisance *per se* is liberally construed in favor of the city.*** The power to

---

*Just what will constitute a nuisance *per se,* or in fact, is not always easy to decide. Thus a slaughter house in the heart of a city has been held not to be a nuisance *per se,* since it could be conducted so as not to be offensive; and it has also held to not constitute a nuisance in fact, in some cases. So a grist mill on the streets of Detroit was held not to constitute a nuisance *per se* or in fact. And the same holding has been made as to a livery stable. See 6 Gray (Mass.) 473; 7 Blackf. (Ind.) 534; 6 Cush. 80; 22 Vt. 321; 14 Mich. 41.

**100 Ind. 575; 98 Ill. 305.

***10 La. Ann. 227; 15 Fla. 306; 2 C. & P. 485; 64 Ia. 59. It was held in the Florida case that building a structure in the street for impounding and confining swine was within the law prohibiting both a public and a private nuisance. A pig stye in a populace place is said to be a nuisance *per se.* 1 Bright. (Pa.) 69. A livery stable is not *per se* a nuisance. 7 R. I. 87; nor is a tannery; 26 N. J. Law, 283. The keeping or manufacturing of large quantities of gunpowder in a

abate and prevent nuisances is usually conferred in general terms, and is held to involve the right to prohibit obstructions in the streets, to control and license theaters and circuses, and the like.*

A nuisance in fact should be judicially determined to be so, before it can be abated; the person whose property rights are to be affected by abating the nuisance is entitled to his day in court. So that a city cannot be legally authorized to declare that to be a nuisance *per se*, and abate it, which may, or may not be a nuisance. (14 Mich. 41.)

A city cannot itself license or maintain a nuisance to the prejudice of private rights.**

Any trade or business which is dangerous to the health, or produces discomfort to the community, may be regulated by ordinance, or enjoined by the courts. But municipal ordinances, as a rule, are not the proper way to abate nuisances in fact, but this may be done.*** The city may cause nuisances to be abated without making compensation for the property destroyed in doing so. If the thing is such as to constitute a public nuisance, it is not regarded of any value, and no property rights are considered destroyed.**** But the nui-

---

thickly populated community is held to be a nuisance *per se*. 1 Swan (Tenn.) 213.

*5 Hill, 121; 4 Yerger, 163.

**12 Heisk. 684; 60 Ind. 591; King v. Cross, 2 C. & P. 483, Judge v. Meriden, 38 Conn; 45 Conn. 450; 74 Tex. 404; 56 Ind. 139.

***20 N. J. Eq. 415; 3 B. & Ald. 184.

****100 Ind. 575.

sance must be shown to exist as a fact, and if the city makes a mistake in abating as a nuisance, a thing that turns out to be no nuisance, it will be liable for all damages caused.*

The city may abate nuisances *per se* summarily, that is, without any hearing or notice. And municipalities may, by ordinance, declare what shall be regarded as nuisances; and even though they are not nuisances in fact, if they come within the general things which the city believes require regulation, the courts will not question their right unless there is a plain abuse of discretion. If the city in its attempt to prescribe what are, and abate nuisances, abuses the discretion given it, the courts will review their action.**

Sec. 1396. SPECIAL LIMITATIONS UPON MUNICIPAL POWERS.—There are certain special limitations upon the powers of municipalities which we will now consider briefly.

Limitations on municipal power are either express, or implied.

Implied limitations result from the principle of construction that a municipality, as a rule, can exercise only the powers granted in its charter.

Express limitations are those found expressed in the city's charter or in the general law of the state.

Sec. 1397. SAME SUBJECT—LIMITATIONS ON THE POWER TO BORROW MONEY.—An incorporated city, by the weight of authority, cannot

*Cole v. Kegler, 64 Ia. 59; 152 Mass. 450.
**22 Ill. App. 574.

borrow money without a legislative permit to pledge its credit.* This power may be conferred by the state legislature, unless the constitution forbids. But that the power to borrow money by implication exists is doubted. There is some contention that the very fact that the city exists as a legal entity or personality, gives it power by implication to borrow money for municipal purposes. The authorities are divided on this question.**

A city may become indebted in the exercise of powers conferred, and liable to an action for such debt, and must then borrow money to pay its indebtedness. And while it would have no authority to borrow the money in the first instance, it can do so when it has already incurred the obligation or debt. The city having authority to borrow may do so by issuing its bonds, possessing the characteristics of negotiable paper. While its usual and express methods of meeting municipal obligations is by the power of taxation. The city has no power, according to some authorities, unless expressly conferred, to issue negotiable paper, a distinction being made between borrowing money and

*37 N. J. L. 191; 74 Pa. St. 488; 19 Wall. 475; Dillon, Munic. Corp., Sec. 507, 508.

**Bank v. Mayor, 7 Ohio, pt. 2, page 31; 19 Ia. 21; 60 Ind. 504; 11 Wis. 470; 22 Neb. 614; 84 Pa. St. 487. The latter cases inclining to the view that while for general purposes the city has no implied power to borrow money, but for purposes suitable and needful to effectuate the objects for which it was created, it has such implied power. Galena v. Corwith, 48 Ill. 423, is an extreme case as to the implied power of the city to borrow money.

issuing negotiable paper. The power to borrow money, when expressly conferred, implies the power to issue negotiable paper. And, by the weight of authority the implied power to borrow money includes by implication the power to arrange for the payment of the debt so contracted by the issue of negotiable bonds, which possess the same characteristics as negotiable paper.*

The power to audit claims, and to issue to a creditor warrants for orders does not confer by implication the power to issue negotiable paper.

Sec. 1398. SAME SUBJECT—LIMITATIONS UPON MUNICIPAL INDEBTEDNESS. — Most city charters limit in express terms the amount of municipal indebtedness. This limitation is usually accomplished in this way: The statute or constitution provides that the city shall not incur indebtedness for more than a stated percentage of the assessed valuation of the city's real and personal property. And thus the amount it may borrow is graduated to the whole amount of property in the city.** A city may

*Tiedeman, Munic. Corp., Sec. 183; 11 Minn. 31; 48 Ill. 423; 75 N. C. 267; 57 Miss. 125; 84 Pa. St. 500; 138 U. S. 673; 144 U. S. 173, hold that a city has no implied power to issue negotiable securities, though the express power to borrow money had been conferred upon it.

**In the constitutions of Maine, Illinois, Wisconsin, Iowa, West Virginia and Missouri, municipal corporations are forbidden to become indebted to an amount exceeding 5 per cent of the assessed valuation. In Georgia and Pennsylvania the limit is 7 per cent, in New York 10 per cent, in Colorado 3 per cent, and South Carolina 8 per cent. This limit is allowed to be exceeded in Indiana, in order to provide for the

not avoid the limitations upon its power to borrow money by calling it raising money instead of borrowing, any pledging of the city's credit comes within the meaning of borrowing money.*

Cities are generally prohibited by legislation from contracting an indebtedness to be paid in the future. Thus, under such a limitation, they are forbidden from contracting an indebtedness in any one year in excess of the limitation provided, and making it payable in the future, in order to get around the limitation fixed.**

An important exception to the rule that a city may not exceed the limit of indebtedness fixed by the constitution or statute is made as against obligations or liabilities incurred *ex delicto,* or by reason of the city's failure to perform duties put upon it by law, as to keep the streets and sidewalks in repair, and other acts of

---

people in time of great public calamity; in Missouri to erect a court house; in New York, a gaol; and in Colorado, to supply water.

*31 Md. 375; 14 N. Y. 356. The person who is about to enter into a contract with a municipality, must ascertain at his peril the legal limits of municipal indebtedness and determine for himself whether the contract he is entering into will cause it to exceed this limit; if it does he cannot enforce payment of the debt due him. The limitation applies to all forms of indebtedness. Buchanan v. Litchfield, 102 U. S. 278; 142 U. S. 366; 42 Ia. 614; 35 W. Va. 605; 87 Ill. 385; 114 U. S. 190; 52 Wis. 37; 91 Pa. St. 398. A few cases hold that the city may exceed the limit for current expenses as salaries and ordinary expenses. Potter v. Douglass, 87 Mo. 239; 36 Ia. 396; 71 Tex. 770; 16 Cal. 249; Contra, 130 U. S. 662; 84 Ill. 626; 88 Ind. 473.

**Jonas v. Cincinnati, 18 Ohio, 318; 59 Mich. 311.

negligence.* The city cannot escape liability for such acts by a plea that it is already over indebted.

Sec. 1399. SAME SUBJECT—OTHER LIMITATIONS.—It has been held that the city council has no authority to offer a reward for the apprehension of offenders.** It has also been held that it has such authority.*** But an officer who is simply doing his customary duties cannot claim such a reward.****

The city has no power to furnish entertainment for its citizens, as by providing for a banquet or celebration at the public expense. (10 Cush. 352.) And the city has not the power to indemnify an officer for expenses incurred in prosecuting and defending suits, in which the officer has been sued for a tort in performing matters pertaining to his office. But some provision is usually made in such cases by which the city does stand the expense. In a case the trustees or council were allowed to employ counsel to defend an action for false imprisonment. (103 Ind. 196.)

The city's power to impound animals must be expressly conferred and strictly observed.***** A municipality has no implied power to assist in the public

---

*People v. May, 9 Colo. 404; Bloomington v. Purdue, 99 Ill. 329; Chicago v. Sexton, 115 Ill. 230; 35 Ia. 114; 16 Cal. 591.

**51 Me. 174.

***23 Pa. St. 391; 7 Gray, 374.

****5 Cush. 219.

*****21 Pick. 55; 35 Ill. 417.

defense by giving bounties to volunteers.* But cities may be authorized to do so by the legislature.**

*30 Mass. 272; 139 Mass. 341.
**50 Pa. St. 150; contra, Cooley on Taxation, 136.

CHAPTER IV.

GENERAL POWERS OF THE MUNICIPALITY.

Sec. 1400. SCOPE OF CHAPTER.—In the last chapter the special powers of the city, with the limitations upon municipal powers were considered. We are now to consider the general powers of the city, by which we mean those powers which the city must possess in order to exist, its essential and necessary powers. They will be presented in the order in which they are usually conferred by the charter.

Sec. 1401. THE RIGHT TO A CORPORATE NAME—HOW OBTAINED.—The first general power or right usually granted or conceded to a city is that of a corporate name, under which rights may be acquired and obligations imposed. Being an intangible entity it requires a name by which to be known more than a natural person. There can be no municipal corporation without a name, and this name is usually designated by the legislature, but may be acquired by usage. In England, by the Municipal Corporation Act, of 1838, the name of all municipal corporations was specified, that of boroughs, being "mayor, aldermen and burgesses of——," and for cities, "mayor, aldermen and citizens of——."* In this country, corporations being usually created under

*Tiedeman, Munic. Corp., Sec. 47; Atty. Gen. v. Worcester, 2 Phil. 3; 15 Sim. 376; 7 C. & P. 537.

general laws, are allowed to adopt for themselves a name, and in contracting, and in suits at law, are required to conform to the general form of name provided for by the statute, as "the city of ——."*

At common law the name of the city might be obtained by grant or prescription. And for certain purposes a city might have two names, either one of which it might act under.** But it could not have two names by grant, as the second grant would displace the first. The name given a city by its charter or general law cannot be changed by the city without the consent of the legislature.*** If the identity of the corporation of the city is not in doubt, rights may be acquired or obligations incurred, even though the wrong name is used. The purpose of the name is simply to identify the municipality and for convenience.**** Parol evidence may be resorted to in order to establish the identity of the corporation, and an obligation entered into by a city under a mistaken name, will nevertheless be good if the identity is clear.*****

Where legislatures create public quasi corpora-

*This is the usual designation under general laws, but the designation is not uniform in the various states.

**1 Ld. Raymond, 80; 1 Strange, 614.

***115 N. Y. 176; Girard v. Phila. 7 Wall. 1; 32 W. Va. 164; 15 N. H. 317.

****First Parish in Sutton v. Cole, 3 Pick. 232; 15 N. H. 317; 7 Taunt. 546; Wakefield v. Brown, 38 Minn. 361; 113 N. Y. 93.

*****2 Kent. Com. 292; 19 Mo. 659; 10 Ohio, 111; 10 Coke, 120.

tions, such as counties, townships, school districts, and the like, without giving them any name at all, they acquire a name by use and reputation.* Otherwise, in suits by and against a municipal corporation, the correct name as prescribed in the statute must be used.** And if an obligation be given to or by a city, in the wrong name, a suit arising out of it should be in the true name of the city, setting out the facts as to the obligation being taken in another name.*** Generally, a mistake in regard to the name of the city, in suits at law, may be corrected by amendment.

Sec. 1402. CHARTER REQUIREMENTS AS TO A CORPORATE SEAL.—Another general power conferred upon municipalities, is the requirement to have and use a corporate seal. The power is usually given to select its own seal and change it at pleasure. The power need not be expressly conferred, and would be inferred or implied from other powers.

At common law a municipality could not act at all except under the corporate seal, but the modern rules is not so strict. Contracts may now be entered into by the corporation without the use of the seal, although, as a rule, all important matters or contracts bear the municipal seal. No formal seal

*13 Conn. 227; 10 Q. B. 839.

**1 Dillon, Munic. Corp., Sec. 181; 10 Mod. 208; 15 Ill. 185.

***County v. Griswold, 58 Mo. 175; 15 B. Monr. 35; Blackf. (Ind.) 36; 10 Coke, 125b; 53 Fed. Rep. 895.

is required, and any scroll authoritatively affixed to an instrument will be sufficient as a seal, if no other had been adopted.*

The legislature usually requires that the city shall have and use a corporate seal. This does not mean that it *must* do so in all cases. Business methods have been changed since the old common law rule was established in regard to sealing, and the signature is now more important than the seal. If the contract has been entered into by the city, and been executed in whole or in part in good faith, the contract will be binding, though no seal has been used, and the form of the statute seems to have required it.**

Sec. 1403. THE POWER TO HOLD CORPORATE MEETINGS.—Another general power conferred on municipality, is the power to hold corporate meetings. This meeting of the corporation is one of its most important functions. These meetings are of two kinds: 1. The New England town meeting, or democratic assembly of the citizens for the transaction of corporate business. This sort of meeting has already been discussed. 2. The meeting of a select, or representative body, called the *council*

*The rule being now, that a corporation need only use its seal where an individual would likewise be required to use a seal in the execution of legal instruments. Bank v. Patterson, 7 Cranch, 299; 107 Ind. 231; 114 N. Y. 122; 60 Mich. 552.

**1 Dillon, Munic. Corp., Sec. 190; 7 Cranch, 299; 30 Vt. 159; contra, Smeltzer v. White, 92 U. S. 390; 35 Ia. 243; 2 Scam. (Ill.) 188.

or *common council.* With respect to their functions, these bodies are both legislative and administrative in character.

Sec. 1404. SAME SUBJECT—ACTION BY THE COUNCIL.—The municipality can act only through its council. The inhabitants or citizens, though they have power to select the members of the council, cannot bind the city in any other way than through the action of their council. They cannot bind the city by a collective vote, or anything of that kind, but some matters are referred to the people to be ratified by their vote.*

The requisites of a valid corporate meeting at common law were determined by prescription; that is, the steps necessary to be taken to summon and hold a valid corporate meeting with power to act for the city, was determined by custom or prescription. Now, it is entirely regulated by statute and charter.

The first requisite of a valid corporate meeting, as provided by charter or statute is, reasonable notice to all persons entitled to attend. Some charters provide expressly the kind of notice that must be given.** The meetings and proceedings of the council are governed by the rules governing legislative bodies, except as modified by charter or ordinance. But the violation of a parliamentary rule will not render an ordinance passed by the council void, if the statutory requisites have been complied with. Thus the statutes

*10 A. & E. 286; 2 Q. B. 850.
**52 Mich. 528; 36 Minn. 176.

usually provide for a number of readings, usually three, before the ordinance can be passed, and if these statutory requirements have been complied with, the mere violation of some rule of order will not invalidate the action of the council.* The council cannot delegate their authority to act, to a committee; but they may appoint committees to investigate, and then take action on their report, without violating the rule as to the delegation of delegated authority.**

The council may pass ordinances and repeal them at will, unless private rights are involved. Where private rights are involved in their legislation, they cannot take them away after creating them. And the rule is that the action of one council has no binding obligation upon the action of any succeeding council except so far as private rights may be affected by such subsequent action.***

Statutory provisions sometimes require that an aye and nay vote on certain questions shall be recorded in the minutes of the council, and by some courts this requirement is directory only, and does not avoid the council's action if not recorded as required.**** Other authorities construe the requirement as mandatory, and hold the action of the council void if the record of the vote is not kept.*****

It has been held that where the statute requires

---

*69 Ia. 348.
**24 How. 287.
***37 Me. 58.
****2 Hill 9; 2 Denio, 323.
*****22 Mich. 105; 59 Ill. 286; 6 Colo. 151; 36 Ind. 90.

that all resolutions shall be passed by an aye and nay vote, this does not cover a motion to adjourn. (50 Wis. 204.) The council has power to make a *nunc pro tunc* entry of an aye and nay vote; that is, they have power to order the entry of the ayes and nays afterwards, where that is the fact, in order to satisfy the requirement.* The aye and nay vote must appear from the records, and cannot be proved *aliunde*.**

The president of the council, who may or may not be the mayor of the city, is usually given the right to vote in cases of a tie vote of the council, and it is also held that he has the right to vote where only half the council vote, and the other half refuse to vote. (113 Ill. 137.)

The council can take no action when less than a quorum is present, and if they do so such action is void. But the corporation may be estopped from raising the question as to a quorum where the rights of a holder of negotiable securities are involved. Thus, if at a meeting at which there was not a quorum present, negotiable securities are issued or provided for, and these securities are purchased by, and held in good faith by some one to whom the city subsequently pays interest on them; in such a case the city would be stopped from setting up the fact that the council had not properly authorized their issue.***

---

*64 Ind. 319; 13 Allen, 129.

**23 Mich. 457.

***20 Ind. 315; 1 Dillon. Munic. Corp., Sec. 292.

At the common law councilmen were not allowed to vote on questions in which they were interested pecuniarily, and this rule still prevails, though it is commonly violated.*

Sec. 1405. SAME SUBJECT—MUNICIPAL RECORDS.—As the ordinances of a city are given the effect of laws, and its action in other than legislative matters is of the utmost importance to all the inhabitants of the city, it is very important that a careful record of the council's proceedings should be kept. Again, while the records of county, township and school district meetings are regarded with considerable liberality by the courts, this is not the case with municipal records, where it is said: "The city speaks only through its records."**

To the rule that a city speaks only through its records, there are, seemingly, many exceptions, and the action taken by the city council may be shown otherwise than by the records. Thus, while it is held that parol evidence is not admissible to contradict the municipal record, it may be used to show that steps

*10 Wend. 659. The rule does not extend to prevent a councilman from voting for the improvement of a street which he has, with others, petitioned the council to pass; 22 Mich. 104; nor to prevent a city from employing its mayor, who is an attorney at law, to defend an action against the city. 33 Mich. 61.

**6 Pick. 16. The rule that a city's action can only be shown by its records, applies chiefly to cases where the statutes require that a record shall be kept. If no record is required to be kept, the keeping of a record is optional, and action taken may be proved by parol.

taken, were omitted from the records.* This results from the principle that private rights cannot be lost by the failure of an officer, as the clerk, to perform a ministerial duty. The rule applying to all duties that are purely ministerial.**

It is held that the city clerk, while still in office, may amend his own records, ex parte, if it is a record that he himself has made. But this is questioned by other authorities, and the contention made that the records should only be amended by the clerk after a mandamus proceeding has been brought against him, and the matter adjudicated.*** In some cases the clerk has been allowed to amend his own records at the trial.**** Much depends upon the nature of the amendment to be made.

A city clerk out of office cannot amend the records which he previously made.***** And where the record has been read and approved by the council it cannot be amended by the clerk without the consent of the council.****** The city council, in session, may

*78 Ind. 1; 12 Wheat. 64.

**Thus where every step required has been taken by the council, and a contract has been entered into, and private rights acquired under such action, but the clerk has failed to perform his duty to properly make up the records of the council's meeting and the action taken, a purely ministerial duty on his part; in such a case the requirement of the statute as to the making of a record will be overlooked to protect private rights that would otherwise be destroyed.

***20 Conn. 590; 40 Conn. 298; 41 Conn. 448.

****27 Vt. 206.

*****12 Met. 105; contra, 9 N. H. 168.

******1 Met. (Ky.) 295.

amend its records; but this cannot be done by a council composed of new members from the one whose records are to be amended.

When it is desired to secure control or custody of the public records, *mandamus* and not *replevin* is the proper action to bring.* But where the title to an office is in dispute, *quo warranto* proceedings should first be brought to try the title to the office, and then *mandamus* to get possession of the records. But such depends upon the particular circumstances of the case, and where a person is a *de facto* officer, and entitled to the records, he may bring *mandamus*.

Sec. 1406. SAME SUBJECT—ORDINANCES. —One of the most important things that a city council has to do, and make a record of, is, to pass ordinances.

By an ordinance is meant a permanent rule enacted by a city for the government of its inhabitants. The framing of these rules or ordinances is left to the city, as a part of the plan of local self-government, since they pertain to matters of peculiar interest and concern to the locality comprised by the municipality.**

*24 Mich. 466; contra, 44 Me. 374.

**"A municipal by-law (ordinance) is a rule binding on a particular district, not being at variance with the general law of the realm, and being reasonable and adapted to the purposes of the corporation, and any rule or ordinance of a permanent character, which the corporation is empowered to make, is a by-law."—Baron Parke, in Hopkins v. Swansea, 4 M. & W. 621; 114 Ind. 332.

In England the word "by-law" is employed instead of ordinance, and in this country the two are used as synonymous

An ordinance is to be distinguished from a resolution, in that an ordinance is of the nature of a local law, prescribing a general, uniform and permanent rule of conduct; while resolutions are special, temporary and limited in their creation or application. There are, therefore, many things that a council may do by ordinance that they cannot do by resolution.* The statute or charter usually provides the things the city may do by ordinance, and those it may do by resolution. The things a city is required to do by ordinance, it may not do by resolution; but if the charter is silent as to the mode of action, the council may perform the act by resolution, duly signed and executed.**

The action of the city council in passing ordinances, resolutions, and by-laws, is in a legislative capacity.*** And the legislature may properly delegate to a city, this right to legislate regarding matters of local concern, though this is an exception to the general rule that the power to make laws cannot be delegated.****

---

expressions, the term "by" or "bye" meaning a burrough or local community. Com. v. Turner, 1 Cush. 493; 43 N. J. Eq. 107.

*30 N. J. Law, 148; 114 Ind. 332; 40 Pa. St. 124; 46 N. J. Law, 62; 49 Mo. App. 612.

**98 Ind. 168; 70 Ia. 105; 148 U. S. 591; 50 Wis. 204.

***Sower v. Phila., 35 Pa. St. 231; Green v. Cape May, 41 N. J. Law, 45; 22 Mo. 105; 4 M. & W. 621.

****State v. Hayes, 61 N. H. 314; Gloversville v. Howell, 70 N. Y. 287; 39 Conn. 183; 66 Ind. 396; 14 Ohio, 586; 44 Ia. 508.

The power to pass ordinances is usually expressly granted to a municipality; but it is held to exist by implication when this is not done. (112 Ind. 15.)

Sec. 1407. SAME SUBJECT—ORDINANCES —METHOD OF ENACTMENT.—Ordinances must be enacted by the proper body, and in the form and manner prescribed by statute; published as required by law, and approved by the mayor, where such approval is required by the statute.*

Municipal ordinances cannot enlarge or vary the powers of the city as conferred by its charter.** But it has been held that the legislature may by express grant give the city power to pass an ordinance which will conflict with, and supersede within the city's jurisdiction, the state law upon the same subject.***

The power to pass ordinances for the government of the city does not authorize the council to repeal a general law.**** The ordinance need not recite the necessity for its passage, or the authority to enact it,

---

*Tiedeman, Munic. Corp., Sec. 148; 33 N. J. Law, 39; 60 N. Y. 16. So, where the charter provided that an ordinance should be introduced at a meeting previous to its adoption, and the council held a meeting, introduced an ordinance; then adjourned for a few minutes, reconvened, and passed the ordinance, it was held void as not complying with the provision.

**Weber v. Johnson, 37 Mo. App. 601; Com. v. Roy, 140 Mass. 432; Mays v. Cincinnati, 1 Ohio St. 268; Thompson v. Carroll, 22 How. 422; Thomas v. Richmond, 12 Wall. 349; 15 Leigh (Tenn.) 697.

***State v. Binder, 38 Mo. 450.

****15 B. Monr. (Ky.) 25.

unless the charter expressly requires the necessity for the passing of the ordinance to be stated therein.*

Sec. 1408. IMPLIED LIMITATIONS UPON THE POWER OF A CITY TO PASS ORDINANCES.—The express limitations upon the power of the city council to pass ordinances are to be found in the municipal charter, but there are also some implied limitations upon the council's power that are now to be considered.

It is an implied limitation that every ordinance must be *reasonable*, and must be in accordance with the law of the land. There are certain private, personal and individual rights that cannot be violated by an ordinance.** The reasonableness of an ordinance is to be judged by referring to existing conditions.*** Again, ordinances must not be oppressive, or special in their nature, but should always be general in their nature and impartial in their operation. Special privileges cannot be granted by ordinances.****

The passing of ordinances and resolutions by a

*7 Cow. 588; 19 Mich. 39.

**145 Mass. 384; it was held reasonable to prohibit preaching on Boston Commons, in 140 Mass. 485; and unreasonable to prohibit the Salvation Army from parading the streets in 63 Mich. 396.

***49 N. J. Law, 391; 68 Mo. 541; 12 Pa. St. 318.

****Prohibiting Negroes from going upon the streets after a certain hour, was held void by the Tennessee Supreme Court, in 8 Humph. 707; and a provision that no steam boiler should be set up within the city without the Mayor's consent, was held unreasonable in 49 Md. 217; 3 La. Ann. 688; 2 Swan (Tenn.) 364.

council being regarded as legislative action, the individuals composing the council are not personally liable for what they do in their legislative capacity, and this is so even if their action is malicious. The motive of their action cannot be inquired into. The reason being, that to permit this would tend to embarrass their freedom of action. Neither are the councilmen liable personally for what is done under a void ordinance.* For improper motives, and for injudicious exercise of their power the legislature, even when in the hands of a council, is answerable to the people alone.

A city may by ordinance regulate, but cannot prohibit trade. The regulation of trades being essential to the proper government of the city, while the forbidding of trade would be unnecessary as well as unreasonable. By the common law certain cities had a prescriptive right to regulate and even prohibit certain trades. But in this country a city cannot regulate a trade so as to create a monopoly. The municipality may not give any person or corporation a monopoly of a particular trade, and prohibit all others from doing such business.** The authority to prohibit, license or regulate trade must be expressly conferred by the

---

*McCulloch v. State, 11 Ind. 424; Cooley, Const. Lim., Secs. 186-7; 124 Mass. 486; 27 Ind. 185. But municipal officials will not be permitted to exercise their legislative powers for their own self-aggrandizement. Freeport v. Marks, 59 Pa. St. 253; Buell v. Ball, 20 Ia. 282.

**2 Cush. 562; 33 Cal. 134; 29 Wis. 307.

legislature upon the city, and does not exist by implication.

Sec. 1409. CONCERNING THE PUBLICATION OF ORDINANCES.—It is a general requirement that all ordinances, before they become operative, shall be published in a newspaper of general circulation in the municipality. The regulations in this regard are not uniform, but the requirement is stringently enforced by the courts.

The requisites of publication must be strictly complied with. The purpose being to give notice to the public of the regulation or law that is about to go into effect, that they may be informed as to what regulations have been made.* The requirement that the mayor of the city, or presiding officer of the council, shall sign the ordinance is sometimes said to be directory. Much depends upon the purpose for which the signature is required, if for verification merely, then the signing is directory; but if the signature is for the purpose of showing the officer's judgment or approval, then it is mandatory.** A revision and recompilation of ordinances, need not be republished.***

Sec. 1410. HOW ORDINANCES ARE PROVED.—In judicial proceedings ordinances are proved in three ways: (a) By the introduction of the official records of the city council. (b) By producing a

*10 Conn. 435; 108 Ind. 208.
**11 Ohio St. 96; 52 Ind. 411.
***52 Mo. 513.

copy of the paper in which the ordinance was published, showing the various issues or publications, in conformity to charter requirements. (c) By authenticated copy of the ordinances and by-laws of the municipality in book form, where the city's ordinances have been thus compiled. Frequently such authenticated copy of the ordinances is made *prima facie* evidence of the validity of the ordinance, but seldom, if ever, made conclusive evidence. The party claiming the validity of the ordinance has the burden of proving that it was regularly passed.

Sec. 1411. POWER TO ENFORCE ORDINANCES BY FINES OR IMPRISONMENT.—The sanction, or penalty that may be inflicted to enforce an ordinance, is limited by express charter stipulations, but inasmuch as a law without a sanction, or capability of inflicting penalty, would be no law at all, the city has implied power to impose a reasonable fine for the violation of an ordinance. The power is usually conferred in express terms.* The sanction for municipal ordinances assumes one of three forms: a pecuniary fine, imprisonment, or forfeiture of goods.

The fine imposed by a city for the violation of its ordinances must be a reasonable one;** and must not exceed the limitation fixed by the constitution or

---

*1 Dillon, Munic. Corp., Sec. 238; State v. Cleveland, 3 R. I. 117; State v. Carpenter, 60 Conn. 97; Conley v. Albany, 132 N. Y. 145; Eyerman v. Blakesley, 78 Mo. 145.

**12 Johns. 122; State v. Bright, 38 La. Ann. 1; L. R. 8 C. P. 416.

statute; which usually fixes a maximum as to fines, and also a maximum as to imprisonment.*

The penalty of imprisonment cannot be imposed except by express legislative enactment. That is, the city has no power to deprive an individual of his personal liberty for violating an ordinance, unless the power is expressly conferred, it is not to be implied. But this does not extend to forbid the city to commit an offender to prison until a sentence of fine and costs have been paid. At common law, no municipal corporation had implied power to impose a penalty of forfeiture of property for a violation of its regulations; and the rule now is in England and the United States, that for the city to possess such a power it must appear by express terms or by clear implication in the charter conferred by the legislature.** Thus a city has been denied the right to providle for the forfeiture of animals running at large; while it may provide for the fine or punishment of the owner of such animals.*** And the city has no power to subdivide a single offense into several, and punish each, as this would be unreasonable.****

---

*N. Y. Consol. Act, Sec. 85; 15 Mich. 54; 5 Ohio, 393; 74 Mo. 395; 16 S. C. 47; 9 Wend. 571.

**Kirk v. Nowill, 1 Term, 118; Cincinnati v. Buckingham, 10 Ohio, 257; 22 Mo. 105; 55 Ia. 378.

***10 Ohio, 32.

****Mayor v. Ordrenau, 12 Johns, 122; Chicago v. Quimby, 38 Ill. 274; 15 Mich. 54. In the last case an ordinance imposing a fine of ten dollars a day for each day an obstruction was allowed to remain after notice, was held void, as not

Sec. 1412. WHO ARE REQUIRED TO TAKE NOTICE OF THE EXISTENCE OF MUNICIPAL ORDINANCES.—The principle that "ignorance of the law excuses no one," does not apply to all kinds of law, or at least to those local laws known as ordinances. As to these, the rule is, that all persons within the corporate limits are presumed to know the ordinances which have been established, and this presumption is a conclusive one.* But local ordinances have no extra-territorial force, and ordinances cannot be passed by the city which will have any force outside of the city limits, or bind anyone beyond the city limits. Thus if the animals of a non-resident stray into the city limits, in violation of the city ordinances, the owner, being a non-resident and not bound by the ordinances of the city, cannot be fined for such offense, but the animals may be impounded.**

Sec. 1413. LICENSE POWER OF MUNICIPALITIES.—The primary object of a license is to defray the expenses of regulating it under the police power of the city. Where the license fee exceeds these ordinary expenses of policing the business and the charges of making out the licenses, it comes pretty close to a tax, but unless the amount so charged is unreasonable it will not be questioned.

The legislature may confer upon the city the

---

coming within the power to enforce such ordinances by a penalty of one hundred dollars.

*3 Allen, 407.

**40 Ill. 301; 1 Parker's Crim. Rep. 481.

power to license trades, occupations and professions, either under the power to tax, or under the head of police regulation. If it is a tax upon the trade or business, its legality or illegality will depend upon whether it is levied with respect to the constitutional restrictions upon the power of taxation. While if it is levied as a police regulation, it must in general be limited in amount to what would cover the expense of issuing the license certificate and maintaining the police supervision. The question as to reasonableness of the license fee is one for the courts, but a wide latitude is given legislative discretion in such matters.* The license may be imposed because the character of the trade or calling requires some degree of skill or professional qualification, and the public is interested in seeing that this is possessed by the party exercising the trade, or it may be because the subject furnishes abundant opportunity for frauds unless supervised by the police. On these grounds, cities have been allowed to license, and subject to police supervision, plumbers, pharmacists, boarding house keepers, cartmen, truckmen, cabmen, car drivers, junk dealers, keepers of intelligence offices, dealers in second-hand articles, peddlers, auctions, livery stables, public amusements, trafficking in liquors, and the professions of medicine and law.**

---

* Boston v. Schaffer, 9 Pick. 415; Ash v. People, 11 Mich. 347; Johnson v. Phila., 60 Pa. St. 445; 31 Ia. 102.

**Tiedeman, Munic. Corp., Sec. 123; People v. Rontney, 21 N. Y. 173; 66 Ia. 259; 57 Cal. 92; State v. Hibbard, 3 Ohio,

There is nothing in the constitutional provision that is violated by such legislation, unless there is some special provision on the subject. And it is held that where the character of the profession is such that its proper regulation requires the number engaged in it to be restricted, the license may be made so high as to serve this purpose; thus in the sale of intoxicating liquors, this may be done.*

There is such a distinction between a license and a tax, that the right of the city to license does not involve the power to tax. A license is a permit to engage in a trade or profession, obtained from a city, upon payment of a reasonable sum, which sum is limited in amount to the expenses connected with its issuing and the necessary police supervision of the trade or calling. This sum so charged must be reasonable, and not such as to constitute a tax, which is a levy to defray the general expenses of government.

A tax must be general as it is imposed for revenue purposes, but a license may be imposed upon special avocations, and it is not necessary that it should be general, if it applies alike to all exercising the same trade or calling.** The power to license, as a general

---

33; 15 Ohio, 625; 6 Ia. 546; 86 Mich. 594; 57 N. Y. 591; 100 Ill. 57; 18 Kan. 271; 22 Minn. 312; 10 Ia. 441; 92 Ill. 669; 78 Mo. 302.

*People v. Cregier, 28 N. E. Rep. 812; 92 Ill. 569; 19 Or. 108; 15 Kans. 627. But where there is a state law regulating the liquor traffic, the municipalities have not authority under their general powers to license the sale of liquors, or prohibit the traffic altogether. 30 Ala. 461.

**Leavenworth v. Booth, 15 Kans. 627; 32 Mich. 406; 15

rule, is not implied but must be expressly conferred by the legislature.*

The power to regulate and license trades and occupations, is derived from the charter, and results from the special character of the trade or profession, requiring that it should be supervised in the interests of the public. These special trades, professions or avocations may be divided into such as are *useful* and *necessary*, and such as are *amusing* and *interesting*, but not necessary, and a distinction is made as to the purpose of the license fee in each case.

1. Special Avocations, Useful and Necessary. These may be *licensed* but not *taxed*. That is, the amount of the license fee must be strictly limited to the amount necessary to provide for the necessary policing and the issuing of the certificate, and must not be so large as to provide incidental revenue.** Other authorities hold that a license upon useful occupations may include incidental revenue, but this is contrary to the rule that taxation must be general and not special.

Ohio, 625; 101 Ill. 475; 38 La. Ann. 328; 80 N. C. 154; 14 B. Monr. 648.

*Mays v. Cincinnati, 1 Ohio St. 268; 19 Mich. 352; 29 Wis. 307; 5 Cow. 462; 31 Kans. 131; 34 Ark. 603. Contra, Kinsley v. Chicago, 124 Ill. 359; Smith v. Madison, 7 Ind. 86; St. Louis v. Woodruff, 4 Mo. App. 169.

**St. Louis v. Woodruff, 4 Mo. App. 169; 58 Pa. St. 119; 73 Cal. 365; 96 Pa. St. 24; 15 Ohio, 625. In the last case it was held that while the city might license a drayman, the power to license did not include the power to tax, or raise revenue from such licenses.

2. Special Avocations, Amusing and Interesting. It is held that these occupations, such as racing, liquor selling, theaters and other public amusements may be licensed for incidental revenue. The extent to which this may be carried is not well settled, it being a question for the courts, and one which is not uniformly answered.*

A license cannot be placed so high as to amount to a prohibition of the trade or calling.** The power to license and regulate the sale of intoxicating liquors is usually governed by state statute. Although formerly the power was conferred upon cities to regulate it locally. And it has been held that the power to license inns, hotels, restaurants and saloons, might be exercised by a city, though the state law forbid licensing the sale of intoxicating liquors, on the ground that saloons did not necessarily sell liquors.*** But general laws on the subject of the sale of liquors, prevent a city from licensing or forbidding the sale of liquors under its charter powers. In the absence of such a general law, cities may license the sale of liquors under their general welfare powers.****

Sec. 1414. ORDINANCES AGAINST PUBLIC OFFENSES.—It frequently happens that a charter is conferred upon the city giving the council power to

---

*11 Mich. 347; 33 N. J. Law, 208.
**10 Ohio St. 268.
***53 Mich. 367; 19 Ga. 586.
****1 Cush. 493; 10 Met. 382; 3 McMillen (S. C.), 233; 36 Ill. 301.

pass ordinances upon subjects which the state also has legislated in regard to, either before or after the passing of the city ordinances. And it may happen that the municipal ordinance is in accord with the state law upon the subject or in conflict with it.

When city ordinances come in conflict with the general law of the state they are void, and this is so, though they are justified by the city charter.* But an act may be at the same time a violation of a state law and of a city ordinance. The question then arises, does the act constitute one, or two offenses? This matter is decided both ways, some courts holding that the offense is double and that the offender may be punished both under the state law and the city ordinance.** Others holding that the offender can be punished but once, and in the court which first acquires jurisdiction; such punishment constituting a bar to any other action for the same offense.***

Sec. 1415. THE GENERAL WELFARE CLAUSE—RULES OF INTERPRETATION.—By the general welfare clause in a city's charter is meant

*56 Ia. 498; 31 Ark. 372.

**Cooley, Const. Lim. 199.

***21 Ga. 80; 9 Mo. 693. Judge Dillon, in his work on municipal corporations, advocates that an offense ought not to be considered as a double offense, at least not as a double public offense. That it might be punished both by the state and the municipality, on the ground that it constituted an offense against the state and also against the local government of the city, in the same sense as counterfeiting may be an offense, and punished by both the state and the United States laws.

the power conveyed in general terms to provide for the welfare of the local community. The general interpretation of this clause depends upon the terms and character of the city charter. And the decisions in regard to its construction must be considered with this fact in mind.

If the general welfare clause is the only power given to the city to pass by-laws, then it is to be liberally construed. While if the charter, in its provisions, names specifically almost everything the city may do, and the general welfare clause is but one of many specific powers it will be restricted in its interpretation, and the powers that may be exercised under it will be very limited.*

In some jurisdictions the city has been allowed to require licenses under the welfare clause; also to pass ordinances preventing the keeping of bawdy houses, and the destruction of ornamental trees.** Also to establish limits, and keep estrays off the streets, and to regulate the opening and closing of saloons.***

Sec. 1416. PROCEDURE TO ENFORCE ORDINANCES.—There are two methods of enforcing ordinances: 1. By action of debt or assumpsit to recover the fine.**** In such a case the action is a

*37 Me. 392; 31 Ala. 76; 11 Ia. 399.

**124 Ill. 359; 11 S. C. 288; 37 Me. 329.

***11 Mich. 425; 38 N. H. 426.

****This was the common law method, and was employed in the recovery of penalties on the theory that there had been a breach of the duty which, by a fiction of law, the defendant had promised the plaintiff to perform. The action of debt

civil one, and the procedure the same as in any other civil action. This method of enforcing an ordinance is now seldom resorted to, since the violators of ordinances are frequently without property, and a judgment against them would be uncollectible. 2. The second method is by complaint and warrant for the arrest of the offender, followed by imprisonment if the fine and costs are not paid. Some courts hold this proceeding to be a criminal proceeding, as regards the method of trial, rules of evidence, and matters of cost.* Other courts hold the proceeding to be only *quasi* criminal in character, and that constitutional guarantees providing for a jury trial in criminal cases do not apply.**

Where the charter provides the method of enforcement of ordinances, this method must be pursued, and the council cannot add on extra punishment; but unless expressly forbidden, municipalities have inherent

---

could be employed because the penalty was a sum certain, and in the nature of liquidated damages. Where the mode of procedure to enforce ordinances is prescribed by charter, that mode must be pursued. Tiedeman, Munic. Corp., Sec. 156; 132 N. Y. 145; 32 N. J. Law, 262; 5 Ohio, Cir. Ct. 578. See 2 M. & S. 60; 27 Ill. 414; 34 Ia. 424; 40 Mo. App. 148; 84 Ind. 168; 34 Ia. 524; 44 N. J. Law, 217.

*31 N. H. 106; 16 Pick. 504; 42 Ala. 630; 17 Wis. 26. Qualifications of the constitutional provision in regard to jury trial in criminal cases is usually made of suits to recover small sums as fines, and of prosecutions for petty offenses. Stimson, Am. Statutes, Sec. 72,132.

**Williams v. Augusta, 4 Ga. 509; Byers v. Com., 42 Pa. St. 89; Goshen v. Croxton, 34 Ind. 239; Keeler v. Milledge, 24 N. J. Law, 142.

power to provide for an action of debt to recover a penalty in their own courts.*

*1 Harris (N. J.) 237; 36 Ill. 177; 132 N. Y. 145; 34 S. C. 541; 3 Burr. 1858; 3 Pa. 353.

CHAPTER V.

MUNICIPAL COURTS AND MUNICIPAL PROPERTY.

Sec. 1417. MUNICIPAL COURTS.—At common law municipal courts existed in certain cities by prescription. Thus, in some of the cities there was a Mayor's court, with various functions, which did not depend for its existence upon any act of the legislature. Municipal courts of this character do not exist in this country, the statutes usually provide for such courts where they exist. In England the creation of municipalities gave rise to the presumption that the city had the power to create a municipal court; while in this country no such presumption arises, the powers of the city being limited to those contained in its charter.* The right to hold such a court at common law was regarded as imperative; and a non-user of the right, though lasting two hundred years, was held no defence to a *mandamus* to compel a municipality to do its duty in regard to holding a court.**

Resulting from the maxim, that no one can be a judge in his own cause, at common law, a borough could not bring an action against a stranger in its own court, by which it sought to obtain a benefit for itself; nor could the corporators act as jurors in such cases.***

---

*Rex v. Mayor, 5 B. & Ald. 692.

**Rex v. Mayor, 4 Dowl, P. C. 562; 1 B & A. 148.

***London v. Wood, 12 Mod. 674; 3 Burr. 1856; 2 Ld. Raym.

In the United States, municipal courts are created only by statute, or by authority of statute. The student should not confound municipal courts with the county and township courts established by statute or the constitution with general jurisdiction, within and without the city; with those specially created, or authorized by statute, to have jurisdiction within the city.*

The common forum usually provided for the city is the police court, or recorder's court, established for the purpose of trying offenders against the criminal laws of the city.**

It is held competent for the legislature to establish these inferior courts within municipalities, unless to do so would violate the state constitution, as to what courts shall be vested with judicial authority.*** But it has been held that the establishment of municipal courts for the trial of offenders against municipal ordinances, is not in violation of a constitutional pro-

778. But this is changed by the municipal corporation Act of 1835.

*Boyd v. Chambers, 78 Ky. 140; State v. Young, 3 Kans. 445.

**The matters usually brought within the jurisdiction of such minor courts, relate to the enforcement of municipal ordinances, the recovery of the penalties for the breach thereof, minor misdemeanors, and trifling infractions of the peace and good order of the community, and suits between individuals when the amount involved is within a certain specified limit. Rohland v. St. Louis, 89 Mo. 180; 34 Cal. 520; 7 Ohio St. 382; 106 N. C. 88; 66 N. Y. 656.

***State v. Maynard, 14 Ill. 420; 9 La. Ann. 350; 66 N. Y. 656.

vision that the judicial power of the state shall be vested exclusively in a Supreme Court, District, Probate and Justice Courts.*

In the exercise of jurisdiction, the municipal courts must be confined to the limits of the municipality. It cannot try offenses outside of the city limits, though it might be authorized to serve its process anywhere in the county. (38 Mich. 469.)

Municipal courts have only such powers as are expressly given. Their jurisdiction is limited and not general, and the exercise of their powers must not be in conflict with constitutional rights. The corporators, or inhabitants of the city are qualified to sit as judges or jurors in these courts unless the city be a party to the action.**

The procedure in such courts may be summary, and without trial by jury, when the offense is the violation of city ordinances punishable by fine only.*** And in some states the police courts of the city are given power to impanel a jury and try crimes of a higher grade, this is the case in Ohio. Where the offense is punishable under general law as a crime, the municipal courts cannot punish the offense without trial by jury.****

It has been held that a summary conviction may be had, where the right to trial by jury may be se-

*State v. Young, 3 Kan. 445; Shafer v. Mumma, 17 Md. 331.

**1 Rich. (S. C.) Law, 364.

***4 Ga. 509; 33 N. J. Law, 213.

****1 Jones (N. C.) 66; 2 Doug. (Mich.) 334.

cured on appeal.* But this is evidently bad law, as the accused is given the right to trial by jury in the first instance.**

The decisions of municipal courts cannot be made final and conclusive by statute. Where no appeal is provided for, a review may be had by writ of certiorari from the Supreme Court.***

Sec. 1418. MUNICIPAL PROPERTY.—Under the early Roman law cities could not become interested in, or take property by donation or legacy. But this rule was changed later under the Emperors, and Roman cities permitted to own property. By the English statute of mortmain, the right of municipalities to take real property was affected. But no such rule ever prevailed in this country, and under certain restrictions, municipalities may acquire rights in property. But they have not the unrestricted right to acquire property given to cities under the English common law, where a city had implied power to take by grant or donation any property not inconsistent with the object of the city's existence.**** In the United States, cities may take only such property as is necessarily reasonable to the enjoyment of powers conferred.*****

*7 Md. 501; 8 Gray, 329.

**127 U. S. 540.

***3 Hill. 42; 44 Mo. 425.

****3 Mass. 329.

*****Thus it has been held that the power to *establish* public markets implied the power to buy a site upon which to place the market; but the power to *regulate* markets did not

Much will depend upon the structure of the charter, and the nature of the corporation, as to what property a city may own. Thus the charter may: forbid the purchase of land; may be silent in regard to its purchase; may limit the amount to be purchased; or confer the general power to purchase, and the question whether the power to purchase is violated will depend upon the construction of the charter under these four conditions. (41 Ind. 212.)

Under a general power to purchase real estate, property cannot be purchased for speculation or profit. Since that is not one of the functions of municipal government.* As a general rule the city cannot hold property beyond its own limits without express authority.** In its private capacity, a city may own lands for a park outside the city limits.*** As trustee, a city may hold land for municipal purposes in a foreign state; and it may also hold property as trustee for charitable uses.**** But cities may not hold property in trust for purposes foreign to the objects of municipal government.*****

---

authorize the buying of a place on which to locate them. See 14 N. Y. 356; 45 Cal. 11.

*1 Doug. (Mich.) 401.

**2 Johns. Ch. 420; 9 N. Y. 64; but for the purposes of maintaining a pest house or for cemetery purposes a city may own lands beyond the city. 29 Mo. 542.

***44 Mich. 602.

****15 How. (U. S.) 671; 2 How. 127; 24 How. 645; 29 Mo. 543.

*****8 Johns. 422; 2 Kent. Com. 280; 15 N. H. 317; 29 Mo. 543.

In New England it is held that a town may become trustee of funds for the support of religion; but it cannot become interested in foreign missionary work.*

The power of the city to become trustee of property for a given purpose, can only be questioned by the state. So that, though it appears that the city has no implied power to take property except for municipal purposes, and it does so, yet its right can only be questioned by the state, unless the attempted holding of property is in express violation of charter provisions, in which case the action of the city is *ultra vires,* and binds no one.**

Municipalities have implied power to alienate the property which they hold in a private capacity.*** While it has no implied power to alienate property devoted to public purposes. To alienate property once used for public purposes it must first obtain legislative permission.****

Sec. 1419. SAME SUBJECT—MUNICIPAL PROPERTY CANNOT BE SOLD ON EXECUTION TO SATISFY A CLAIM AGAINST THE CITY.—As a rule city property cannot be sold on

---

*38 N. H. 459; 54 N. H. 18.

**29 Mo. 543; 12 Wall. 35.

***5 Ohio St. 113; 102 U. S. 472.

****2 Dillon, Munic. Corp., Sec. 517. Thus a city cannot dispose of a public square, commons or a public street, and pass title to it. The city holds as trustee for the public and cannot divest the public of its rights in it.

execution to satisfy a claim against the city. There are several views on this subject:

1. City property used for public purposes cannot be taken on execution; this would protect such property as the city buildings, fire apparatus, waterworks, and the like.*

2. Some states hold that property held by the city in its private capacity, and only *quasi* public in character, may be taken on execution.**

3. In most of the western states the only remedy to enforce a claim against the city is by *mandamus,* to compel the city officials to spread the claim or judgment on the tax roll. And the same method must be pursued to obtain satisfaction of a claim against a county, township or other administrative corporation.***

4. In some of the New England states the property of a private individual might be taken on execution to satisfy a judgment against the city. This line of authorities arose from the peculiar character of the New England town, where the government being purely democratic, the acts or obligation of the city were regarded to be the obligations of each individual in the same manner as a partner becomes liable for partnership debts.****

---

*69 Mo. 306; 43 N. J. Law, 158; 36 Pa. St. 126.

**15 Cal. 630; 17 Ia. 276; 15 W. Va. 131.

***98 U. S. 381; 62 Ga. 324.

****13 Conn. 368; 102 U. S. 472.

Sec. 1420. HOW MUNICIPALITIES MAY ACQUIRE PROPERTY—THE PRINCIPLES OF DEDICATION AS AFFECTING MUNICIPALITIES CONSIDERED.—As a general rule, it is said, municipalities, or the public, cannot acquire property by *grant,* but only by *dedication.* And therefore it was said that the public could not acquire rights by prescription, because this presupposed a grant. But a grant, once made, is the very best evidence of an intention to *dedicate.*

Dedication is the act of devoting or giving real estate to public use, in such a manner as to conclude the owner. At common law, dedication required some act indicating an intention to devote the property to public use on the part of the donor, and an acceptance on the part of the public.*

In an early case in this country involving the dedication of Boston Commons, it was held:

1. That the legal title need not pass from the owner. That is to say, the owner may retain the fee, but the public are invested with the property for public use so far as requisite, and as against such use the owner is concluded.

2. That it is not necessary to constitute a dedication of such property that there should be a definite grantee.

3. That a valid dedication might be made by

*6 Hill, 407; 6 Pet. 431. The last case is a leading case on this subject, as well as one of the first cases in this country. It involved the dedication of Boston Commons.

parol. And this, though the Statute of Frauds requires all grants of land to be in writing, as the Statute of Frauds is held not to apply to lands acquired by dedication.

4. That no specific time need elapse to make the dedication complete. That is to say, that the law with reference to prescription and adverse possession does not apply to the dedication of lands.

5. But there must be a definite and certain parcel dedicated; and an acceptance before withdrawal. Up to the time of such acceptance the offer of dedication may be revoked.*

Sec. 1421. SAME SUBJECT—THE FACT OF DEDICATION MAY BE ESTABLISHED IN THREE WAYS.—Evidence or proof of dedication may be secured in three ways:

1. By a recorded plat, making reference thereon, to streets and squares. This is the most common way, and will amount to a dedication of these squares and streets to the public, but does not necessarily imply that the dedication is complete until the public has accepted it. (33 Fed. Rep. 730.)

2. By parol declarations of the owner, including an intent to dedicate. Though this is seemingly in violation of the Statute of Frauds, it is held that the Statute of Frauds does not apply to dedication. (2 Vt. 480.)

3. By adverse user for the statutory period.

---

*107 Ill. 218.

In such cases the fee to the streets and squares remains in the original owner, as a general rule, and is only subject to the easement enjoyed by the public for the public use.

A city is not chargeable with obligations in reference to land dedicated to it until acceptance is made. Thus a street may be opened and the only evidence that it is a street is that it is used to some extent, and the owner has filed a plat declaring the streets therein to be dedicated to the public. The city is not under obligations to keep such street in repair until it can be shown that it has accepted it. So that if any one were injured in such a street, to make the city liable he would have to show that they had accepted the dedication and had thus become obligated to keep it in repair.

This acceptance by the city may be made in two ways:—

1. By public records; that is, by accepting the dedication publicly, and then making a record of it.

2. By expending money on, or improving the land dedicated, by public authority. The doing of such acts shows the dedication to have been accepted, and it is then complete.*

The dedication must be made by the owner of the estate in the land. One cannot dedicate the land of another to the public, any more than he could convey land by grant. A dedication may be made by an individual or a corporation, as a municipality, in regard

*42 Me. 9; 44 Mich. 467.

to lands owner in its private capacity.* Or the dedication may be made by the state, or the United States.**

A widow of the donor cannot have dower in lands dedicated to the public use, as where a plat is made and the streets dedicated to the public; but the owner could not dedicate lands fraudulently for the purpose of depriving his widow of dower therein.***

The dedication must be for a public use, such as for streets or public squares and the like.**** The marking on the plat, where the plat is recorded, that the grounds set aside are for depot grounds, is not such a dedication as will give a depot company any title to the grounds. So marking the land does not deprive the owner of his title, or give the company any easement therein.*****

The city cannot alienate the lands dedicated for public use, or change the purpose for which they were dedicated. Thus, if grounds have been dedicated for a public park; the city has no power to sell this land or use it for any other purpose, and may be enjoined at the application of those interested, and could not confer or pass title.****** If the municipality, for any reason ceases to use such land for the purpose for

*17 How. 426.

**74 Ind. 29; 33 Fed. Rep. 730.

***3 Ohio, 25; 8 N. Y. 10.

****12 Ill. 38. Or it may be for a burying ground, 6 Hill. 407; for school purposes, 11 Pa. St. 444; or for recreation or ornament, 24 Ia. 283.

*****61 Ill. 89.

******33 N. J. Law, 13.

which they were dedicated, they revert to the original donor.*

A court of equity will restrain an abuse of the trust, as the city's possession is in trust for the public.**

Much will depend upon the wording of the dedication, as to whether the land will revert to the donor or not. While as a rule it is coupled with a trust, property may be unconditionally dedicated so as not to revert to the donor because of misuser.*** In some states it is held that lands dedicated for street purposes, when abandoned, revert to the adjoining owner;**** while in others it reverts to the original proprietor who made the donation.*****

As between the municipality and the state, the legislature may change the use of property dedicated for public purposes. The rule just stated as to the non-change of such property applies only as between the city and the original donor.****** If lands are dedicated to the public "in trust for public use forever," then the fee passes to the municipality, and the donor is powerless to complain as to such use.*******

*18 Ohio St. 221.

**6 Pet. 498; 61 Mich. 144. In the last case, it was held that, lands dedicated to the county for a court house and county-seat, reverted to the donor if the county changed the county seat.

***6 Pet. 498.

****50 N. Y. 694.

*****75 Ill. 301.

******22 Ia. 351; 44 N. J. Eq. 179.

*******4 Pet. 232; 109 U. S. 675.

CHAPTER VI.

MUNICIPAL CONTROL OVER STREETS.

Sec. 1422. METHODS OF TRANSPORTATION.—The public streets of a city are used for transportation, and the control of the city over these various agencies of transportation is becoming of more and more importance with the increase of population and the new devices for the transportation of persons and ideas, as well as of heat, light, and other commodities. The streets are now used as highways for the transportation of tangible and intangible things. Thus, the use of city streets at present, includes the transportation or carriage of things by animal force, and mechanical force; the latter including electricity; again, the use of the streets, involves the use of public and private agencies. The carriage of light and ideas as by telephone and telegraph, is frequently by public agency. The carriage of light and power through the streets by poles and wires for private use, by private agencies, is unauthorized, although sometimes tolerated.

The questions to be considered in this chapter may be divided into two subjects: 1. Public rights, and how they are affected. 2. Private rights, and how they are affected.

Sec. 1423. PUBLIC RIGHTS IN THE STREETS AND HOW AFFFECTED.—The use of the streets as an avenue of communication is under

the absolute control, in the first instance, of the state legislature. And the legislature has quite generally delegated its power of control to the municipality.* So that, a new use of the streets authorized by the legislature cannot be a public nuisance.**

Municipalities have only such power of control over the streets as the legislature may have delegated to them. The mere existence of the city gives it no powers, unless the legislature, by express or implied provisions has delegated some of its powers to the city.

A city cannot permit a new public use of its streets without legislative sanction. Thus a city with power to establish horse-car railways, and general power over its streets, yet could not authorize a steam road, without legislative authority.*** A general power over its streets does not give a city authority to permit a new public use of the streets, for that public use would be a public nuisance.****

Circumstances may show that though general

*35 N. J. Law, 208; 115 U. S. 650.

**49 N. J. Law, 393; 97 Mass. 555. Thus the legislature may authorize a company, through the city charter, to establish a street railway, propelled by animal power, and later authorize the use of electricity as the motive power; this new use, or double use, has given rise to many serious questions; but such new use cannot be regarded as a public nuisance if authorized by the legislature, though it may constitute a private nuisance, and give rise to an action for damages. Telegraph poles in the highway, without legislative permit, have been held to constitute a nuisance at common law. 9 Cox Cr. C. 175.

***41 N. J. Eq. 93; 51 Ark. 491.

****2 Dillon, Munic. Corp. (4th ed.), Sec. 680.

words are used in the charter or grant of powers to the city, yet they were intended to cover the new use in question. That is, the charter may be so general in its language as to indicate to the courts that the new use was contemplated by the legislature. The legislature may be deemed to have intended, though the terms are general, those agencies that are usually recognized.*

As a rule, a new use of the streets, as a medium of communication, is usually accompanied by conditions imposed by the municipality. These conditions imposed by the city must be complied with, or the franchise may be taken away. The courts are quite technical in insisting on the fulfillment of these imposed conditions, since they are imposed not so much for the profit of the city as for the protection of the public.** In imposing conditions for a new use of the streets, the city cannot act arbitrarily, nor make conditions that amount to a withholding of its consent. And

*16 R. I. 668. In this case an electric railway had been established by authority from the common council. A bill was then filed by an abutting owner to enjoin the erection of poles in front of his house. The question raised was, whether this placing of poles in the streets was not an additional servitude, and whether the council had authority to authorize such a use under a general power mentioning horse power and other power. Held, that it was no additional servitude, and that the use of electricity was included in the general terms. The question as to electric wires and poles being an additional servitude is not definitely settled, the authorities being in conflict.

**42 N. J. Eq. 490; 31 N. J. Eq. 638.

though the charter uses the word "may" in regard to the city's power to confer a franchise upon electric power companies, it is held that this does not imply that the power is permissive or discretionary, but if arbitrarily refused by the city, may be compelled by mandamus against the common council.* Other courts hold that the franchise may be withheld from such companies by the municipality, without giving a reason for its action, on the ground that they are for local convenience, and their determination, under the principles of local self-government, should be left with the local government. That is, the city should decide what use it desires made of its public streets, and on principle this would seem the reasonable rule.**

A municipality, by virtue of its existence as a city, may impose reasonable conditions in granting a franchise for the use of its streets. Thus it may require that the street, or part of it, shall be paved, or graded; that a steam motor cannot be used on the public road; the placing of poles may be regulated; and that street railways shall from time to time change the grade in the street as the city may deem necessary.*** Municipal consent to the use of the streets for wires or poles, or other new use, once given, cannot be arbitrarily withdrawn.****

Under its police power, the municipality may con-

*20 N. J. Eq. 61; 24 *Id.* 118; 2 Dillon, Munic. Corp., Sec. 705.

**Keasbey's Electric Wires, 29; 10 Wall. 38.

***34 Ind. 304; 96 U. S. 521; 66 N. W. Rep. 949.

****49 N. J. Law, 303; 32 Barb. 358; 16 Fed. Rep. 309.

trol the location of electric poles and wires, but it must be exercised with due regard to the rights of the company, and cannot be located arbitrarily, or in impracticable places.* As a rule, the city's control over the streets for electric lighting and power is greater than for their use for telegraph and telephone service, the reason being that with respect to the latter purposes, the United States has passed certain postal laws, designed to facilitate the transfer of intelligence, which laws limit the power of the city in regard to these matters, and for the further reason that the latter are considered much less dangerous than the former. The power of the city to control and regulate, never involves the power to destroy the franchise.** It is said that the municipality cannot require electric wires to be placed under ground, after poles and wires have been located; but the legislature may do so, and it is perhaps a due exercise of the police power to require this to be done in a large and populous city, and that no compensation need be given the companies in ordering the change.***

Sec. 1424. SAME SUBJECT—LIMITATIONS UPON THE POWER OF THE CITY TO CONTROL STREETS BY U. S. POSTAL REGULATIONS.—The use of the public streets by telegraph and telephone companies is affected by the legislation

*31 Mo. App. 33.

**98 Mo. 622; 84 Mich. 257.

***Keasbey on Electric Wires, 50; 38 Fed. Rep. 552; 107 N. Y. 593; 125 N. Y. 641.

of the federal government, which puts the control of these agencies beyond the local government in most cases. The first act of Congress upon this subject was on July 24th, 1869 (Rev. Stat. U. S., Secs. 5263, 5268), when, as a result of the Civil War, it was found to be expedient for the United States government to have control of the means of communication of this character, and it was provided in that act, that telegraph companies might construct, maintain and operate their lines over the Post roads of the country, or over any Post roads afterwards to be constructed, or declared to be such by law. In return for these grants conditions were imposed on the companies, and the acceptance of these conditions were to be filed with the Postmaster General,—the conditions referring to the use of such lines by the federal government when it needed them. In 1872, Congress passed an act declaring railroads and letter-carrier routes to be Post roads. And in 1884, all public roads and highways were declared by Congress to be Post roads. The power to pass these acts has been upheld on the ground that they are incidental to the control of the federal government over commence and the postal service.*

A state legislature cannot give to any telegraph company the exclusive privilege of using the public

*96 U. S. 101. In which case it was held that an exclusive right to use the streets and highways for telegraph purposes, conferred upon a company, by the state legislature, is void as against another company operating an inter-state telegraph company, and desirous of using the public streets for the same purpose.

streets and highways. Nor can railroad and turnpike companies give exclusive rights of way to a telegraph company; though they may give their entire business to one company.* Such contracts conferring exclusive rights are void as against public policy, as well as against the acts of Congress.** The Act of 1866 as to Post roads, confers only public rights; private rights cannot be taken without the consent of the individual. But the Acts of Congress give no power to condemn for such use, and if it is found that the erection of poles in the highway is a new use, the telegraph companies cannot proceed under federal authority. But it is usually held that they do not constitute a double use or additional servitude.

Under the Acts of Congress as to the use of Post roads for telegraph purposes, it is held that the right to use a railway as such a road, must be with the consent of the company.*** No compensation is allowed the abutting property owners for the use of the public streets and highways for telegraph purposes, unless such use is held to be a new burden. And the question as to whether such use is a new burden is not fully settled, the deciding cases being in conflict.**** But such telegraph companies have no right or authority to cut or trim branches in the streets or along country roads, without the consent of the abutting owner. Telegraph lines on Post roads are still subject to municipal

*65 Ga. 160; 9 Biss. 72; 11 Fed. Rep. 1.
**70 N. Y. 301; 11 Fed. Rep. 1.
***6 Biss. 158; 9 Biss. 72.
****4 Mackay, 424; 136 Mass. 75; 37 Minn. 347.

control in their method of conducting their affairs within the city. And though they get their right to erect poles and wires upon Post roads from the Acts of Congress, this does not relieve them from municipal control in other matters, nor does it exempt them from state taxation.*

Sec. 1425. SAME SUBJECT—ARE RAILWAYS A DOUBLE USE OF STREETS AND HIGHWAYS?—The state legislature has the power to authorize the railway company to occupy streets and highways on such terms as it may dictate. That is, the legislature may take the public streets and give them over to another or double use.** And, if the fee to the streets is in the municipality, this may be done without compensation to the municipality; since the city is an arm of the state it can collect no compensation for the double use.***

If the fee to the streets exists in the adjoining owner, two views are maintained on the subject:

1. That the adjoining owner is entitled to compensation for the increased servitude. That is, for the new occupancy of the street by a street-car, or railway company, the owner of the fee is entitled to compensation for this added, or extra servitude, which

*125 N. Y. 641; 125 U. S. 530.

**114 U. S. 453.

***10 N. J. Eq. 352 But the fee of the street being in the city is meant, not only that the city has an easement in the land for public use, but that the title has been so completely dedicated to the city that it has the fee, or full legal title to the land.

was not contemplated in the original grant or dedication to the public.

2. The other view is, that the adjoining owner is entitled to compensation whether he owns the fee or not. This view may result from the fact that the new use or extra servitude may impair the value of the abutting owner's holdings.

Surface railways, operated by horse power, are not usually regarded as an additional servitude. Nor are electric cars.* Railroads operated by steam power in the public streets are an additional servitude, and compensation must be made to the adjoining owner, regardless as to the ownership of the fee.**

Elevated railroads are held to be an additional servitude in the street, and here again, it matters not who owns the fee of the street; as the adjoining owner has such a right to the peaceful enjoyment of his property, and the right to light air, peace and comfort, that these *adjacent rights* will entitle him to compensation for the unusual use of the streets by an elevated railroad.***

Whatever be the character of the road, as a rule,

---

*85 Mich. 634; 47 N. J. Eq. 380.

**136 U. S. 121; 7 Colo. 113; 45 Minn. 7. Contra, 87 Mich. 369.

***90 N. Y. 132; 104 N. Y. 287. In these cases, involving the rights of adjoining owners to recover compenation for the use of the streets by an elevated railroad company, the right to compensation was upheld on the theory that the *rights* of *adjacency* in the adjoining owner were such as to entitle him to compensation, regardless of the ownership of the fee in the streets. See 70 N. Y. 327.

if it be so constructed, as to actually increase the burden of servitude, additional compensation must be paid to adjoining owners.*

The municipality may be authorized to permit the use of its streets by railway companies, and such a franchise, when granted, has been held to be irrevocable. And if the statute granting this privilege imposes the obligation of keeping the streets in repair, a license to occupy the same by a street railway company, will not relieve the city of its obligation.** In the use of the streets, the street cars are entitled to precedence on their tracks, as against teams.***

Sec. 1426. SAME SUBJECT—REMEDY FOR WRONGFUL DOUBLE USE OF A STREET.—The remedies which may be had for the wrongful second taking of the public streets and putting them to a double use, may be: 1. An indictment for a nuisance. But this is seldom resorted to, unless where a railroad company persists in occupying the streets without any authority. 2. An action for damages by the adjoining owner. 3. An injunction against the use of the streets for the purpose complained of. Which one of these remedies should be resorted to would depend upon the facts and circumstances in the case. In a few states an ejectment may be brought by an adjoining owner against the party so using the streets.****

*87 Mich. 361; 27 Wis. 194.
**7 Cush. 490; 51 Me. 313; 84 N. Y. 247.
***14 Gray, 69; 31 Ia. 537.
****125 Ind. 476.

CHAPTER VII.

POWER TO MAKE PUBLIC IMPROVEMENTS, ETC.—DISSOLUTION.

Sec. 1427. POWER TO MAKE PUBLIC IMPROVEMENTS.—One of the most important powers that is exercised by a city is the power to make public improvements. This power is carried out by the city through assessments levied upon the persons benefited by the improvements, whether constituting the whole number of inhabitants or only a portion of them.

The city's power to pave streets is usually conferred by charter, under the general control of the city over the public streets. The power being liberally construed and interpreted. Where the general power to pave streets is conferred, at the expense of the abutting owners, under special assessments, this, as a rule, includes all kinds of paving that are customarily used, the power being liberally construed so as not to defeat its evident purpose.* Such a power includes the placing of curb stones, the construction of gutters, and all other incidents essential to good paving, all of which may be assessed to the abutting owner.**

The city may compel the building of sidewalks by ordinance, without a special legislative sanction; doing so under their general power of control over the streets,

---

*24 Ill. 496; 31 Ia. 31.
**36 Pa. St. 29.

and under the general power to pave and grade streets. Their power extends to putting down the sidewalk if the owner neglects to do so and assessing the cost against him, which is, by statute, made a lien, upon the property the same as taxes. But a city cannot sell the lands of an abutting owner for the expenses of street improvements, without express authority from the legislature. The extent to which the city may assess abutting lands for street improvements is usually limited to a certain per centum of the assessed value of the lands within a stated number of years, and this limit must be observed.

Where the assent of the abutting owners is required to a public improvement, as is frequently required, such requirement is jurisdictional, and goes to the very foundation of the city's power to make the improvements. If a petition is required from the owners this must be had before the city has authority to act.*

The charter generally requires notice to be given to abutting owners of the contemplated improvement; and the owner is given an opportunity to be heard; but it is held that this requirement is not absolutely necessary. The legislature may exercise its discretion according to some courts, and dispense with the giving of notice to abutting owners in providing for public improvements.** In Michigan, the rule is otherwise,

*26 N. J. Law, 594; 1 J. S. Green (N. J.) 196.

**19 Ohio, 405. By statute notice is now required to be given.

and before any lien can be fixed upon property, the owner must have notice, so as to be heard if he so desires.*

The public improvements commonly made at the expense of the abutting owner are, the paving and grading of streets, and the building of sidewalks and sewers. The expense is usually provided for by means of local assessments, which assessments may assume one of three forms:—

1. By the foot frontage of the property bounding and abutting upon the improvement.

2. On the value of the property fronting on the improvement; which may be, (a) on the value of the land as they are with the buildings; or (b) on the ground value, irrespective of the improvements upon it.

3. In assessment districts, according to the benefits which will result from the improvement. That is, the entire expense is not assessed upon the abutting owners, but a certain percentage is borne by the public at large, and all the lands in the various districts are assessed in proportion to the benefits which it is judged they will derive from the improvement. This plan is favored by the courts as being the most satisfactory way of apportioning the cost of such improvements.

A local assessment made without regard to benefits, is void; that is, if there are no benefits conferred, the courts will endeavor to avoid the assessment.** If the charter gives a particular method of enforcing

*35 Mich. 162.
**82 Pa. St. 360.

the local assessment, this mode excludes all others. But unless the charter deprives the city of the common law remedies to collect such assessments, they will remain.* The amount of such local assessment is not a lien upon the land, unless made so by the legislature. It is a mere personal obligation, unless declared to be a lien.**

Sec. 1428. LIABILITY OF THE MUNICIPALITY FOR ITS TORTS.—To what extent is the municipality liable for its torts?

1. The city is not liable for legislative or discretionary action on the part of its officers resulting in private damage.***

2. The city is not usually liable for a failure to enforce its by-laws or ordinances, through which injury results to an individual.****

3. The city is not usually held liable for its neglect to abate nuisances.*****

4. And, at common law, the city was not liable to those damaged, for changing the grade of the city streets. But this rule is quite generally changed by decisions and by statute.******

5. Abutting owners on a street are not entitled to lateral support; the city may grade up to the street line, and is under no obligation to furnish support for

*4 Ga. 68; 26 N. J. Law, 390.
**38 Pa. St. 339.
***1 Denio, 595.
****11 N. J. 396; 45 Ga. 153.
*****51 Ala. 139.
******62 Mich. 392.

the abutting owner's property, the common law obligations between individuals in this regard not being applicable to municipalities. (2 Dillon, Munic. Corp., Sec. 991.)

Sec. 6. In the absence of statute, and under the common law rule, a change of grade, not made for ordinary street purposes, gives the abutting owner a right to damages for such change.*

7. The city is not liable for the destruction of property by mob violence. And this rule is not changed by statutes placing upon the city the duty to police its streets. Even a neglect of this duty would not, it appears, make the city liable.** But for the negligent management of property which it holds in a private capacity it would be liable if injury occurred in consequence of such mismanagement.***

Sec. 1429. DISSOLUTION OF MUNICIPAL CORPORATIONS—IN ENGLAND.—In England, a municipal corporation may be dissolved in four ways:—1. By act of Parliament. 2. By a loss of an integral part of such corporation, or by a loss of all, or a majority, of the members of an integral part, without whose co-operation it is impossible for the municipality to transact business. 3. By surrender of its franchise to the crown, and its acceptance by the

*2 Dillon, Munic. Corp., 1238.

**Western College v. Cleveland, 12 Ohio St. 375.

***3 Hill (N. Y.), 321. Where the city of New York was held liable in damages to a person injured by reason of negligent construction of its waterworks out of the city, and which it held in a private capacity.

crown. The king could establish a municipal corporation at common law, but could not destroy it, without its consent. 4. By a forfeiture of its charter, on account of non-user or mis-user of the franchise.*

Sec. 1430. SAME SUBJECT—HOW DISSOLVED IN THE UNITED STATES.—The methods of dissolution of a municipal corporation in England are not applicable in this country because of the difference in our institutions. We have no integral parts in our municipalities, there being but one single corporate whole, comprising all the inhabitants of the community; our institutions, likewise, forbids the forfeiting of a municipal charter for mis-use or non-use, as these abuses are provided for and means of correction exist, and these are deemed preferable to the depriving any community of the rights of local self-government.**

The only way, then, in which municipal corporations can be dissolved is by the legislature, which created them, and which has the sole power of control over them.*** It is very unusual for a city to desire to surrender its charter, the only instances being where

*Tiedeman, Munic. Corp., Sec. 37; Rex v. Amory, 2 T. R. 515; Smith's Case, 4 Mod. 53; 1 Dillon, Munic. Corp., Sec. 165.

**Hambleton v. Dexter, 89 Mo. 188; Butler v. Walker, 13 So. 261.

***Tiedeman, Munic. Corp., Sec. 39; Dillon, Munic. Corp., Sec. 168; Meriwether v. Garrett, 102 U. S. 472. But see Hill v. Kahoka, 35 Fed. Rep. 321, where the state of Missouri deprived a city of its charter by *quo warranto* for non-user, and subsequently reincorporated it.

they desired to rid themselves of corporate indebtedness.* As to the rights of the municipal creditors where the city has surrendered its charter to the legislature and the same has been accepted, two cases arise: 1. Where the community immediately organizes as a new corporation, assuming the public property of the old, in which case, the obligations of the old city follow, and are valid claims against the new.** 2. Where no other corporation is substituted for the one dissolved. In which case the creditors are powerless to collect their claims, as they cannot levy upon public buildings, and the like, as these pass to the state; there is no way of compelling the claims to be spread upon the tax duplicate of a dissolved community, and they cannot look to the property of the individuals composing the community, either before or after dissolution.*** Unless the legislature of the state comes to their assistance there is no means by which the creditors can enforce their claims against the dissolved corporation.****

---

*Seibert v. Lewis, 122 U. S. 284; Meriwether v. Garrett, 102 U. S. 472.

**Mobile v. Watson, 116 U. S. 289; Broughton v. Pensacola, 93 U. S. 266; People v. Murray, 73 N. Y. 535; Brooklyn v. Smith, 104 Ill. 429.

***Tiedeman, Munic. Corp., Sec. 43; Dillon, Munic. Corp., Sec. 173.

***Barkley v. Levee Com., 93 U. S. 258; Heine v. Levee Com., 19 Wall. 655; Thompson v. Allen Co., 115 U. S. 550; Amy v. Watertown, 130 U. S. 301; Meriwether v. Garrett, 102 U. S. 472.

QUESTIONS FOR STUDENTS.

The questions are numbered to correspond with the sections in this book. The answers and references for further study may be obtained by referring to the corresponding sections.

PRIVATE CORPORATIONS.

Chapter I.

1201. Give the various definitions of a corporation, and state what fact each definition emphasizes. To what extent is a corporation a separate legal entity?

1202. Mention and explain the three theories given in regard to the nature of the corporate personality.

1203. Give the definition of a franchise. Where do all franchises spring from? Into what classes are franchises divided? Explain each.

1204. Give examples showing when a corporation is considered as a person; a collection of persons; a franchise.

1205. Explain fully how a corporation differs from a partnership; from a joint-stock company; from an unincorporated society; from a syndicate; from state institutions.

1206. What are some of the tests of corporate existence? What words are necessary to create a corporation?

1207. Give the various classifications of corporations.

1208. Name some of the authorities on the law of private corporations.

Chapter II.

1208a. Explain the general steps necessary to the creation of a corporation.

1209. Who can create a corporation? From whence does this power come?

1210. In what ways may the consent of the sovereign power to the creation of a corporation be shown? Describe each.

1211. In what forms may the legislative authority creating corporations be exercised? Describe each.

1212. From what do the limits upon the legislative authority as to corporations arise? Explain the limitations arising from the nature of legislative authority and from the nature of a franchise.

1213. What are the restrictions on the legislative power over corporations arising from federal constitution?

1214. What limitations arise from the provisions of state constitutions?

1215. Explain the power of Congress to create corporations in the States; in the Territories and the District of Columbia.

1216. What are the powers of territorial legislatures as to the creating of corporations?

1217. What is meant by a promoter? How are they classified? Define and explain each.

1218. What may be said as to the general nature of the corporate charter?

1219. Explain how a corporate charter results from offer and acceptance. To whom is the offer made and how is it accepted?

1220. What constitutes the corporate charter, when the charter is granted by special act; when granted under general laws? What is meant by the articles of incorporation?

1221. What is the nature of the association, and from what does it necessarily arise?

1222. Describe fully the various forms the association contract may take, and give the effect of each. What may be said as to conditional subscriptions?

1223. What are the rules applicable to express conditions? Do the authorities differ? What is the principal implied condition attaching to subscriptions at common law?

1224. What may be said as to conditional subscriptions prior to incorporation? What conflict in the authorities?

1225. What are the holdings as to the validity of a subscription upon conditions precedent; upon conditions subsequent?

1226. What is the effect of a conditional delivery of a subscription? If delivered to the agent of the corporation, what is the effect?

1227. What may be said as to the effect of fraud and mistake upon subscriptions to stock?

1228. Who may subscribe for stock in a corporation; who may not?

1229. What was the method of organization under a charter granted by the king? Under general incorporation laws?

1230. How is proof of organization made?

1231. At what time does corporate existence begin? Give the various views in this matter.

1232. What are the essential conditions of *de jure* corpo-

rate existence? What are the express mandatory conditions?

1233. What are the conditions necessary to a *de facto* corporate existence?

1234. What are the conditions of corporate existence by estoppel?

1235. What parties will be estopped to deny the existence of a corporation?

1236. What is the effect of the failure to comply with conditions required for incorporation? Describe fully.

Chapter III.

1237. What may be said as to the necessity of members in a corporation? Could a corporation exist without members?

1238. How is membership acquired in a corporation not having stock; in one having capital stock?

1239. What may be said as to a corporation being composed of integral parts?

1240. What constitutes the organs of action in a corporation?

1241. What may be said as to the qualifications of agents and officers in a corporation?

1242. What may be said as to the functions and powers of shareholders and directors of a corporation?

1243. What are the functions of the other corporate officers?

1244. Explain the origin of the implied or resulting contracts in a corporate organization. Name these implied or resulting contracts.

1245. What is the purpose of corporate funds? How are they designated?

1246. Explain the meaning of capital of a corporation, and capital stock.

1247. What is the purpose of capital stock? How is it regarded in law?

1248. How are capital stock and shares of stock to be distinguished?

1249. Name and explain each of the various kinds of shares in corporations.

1250. How is the right to create a capital stock and deal with same regarded in law?

1251. What is the general nature of shares of stock? How are they evidenced, and transferred from one to another?

1252. What is the necessity of a corporate name?

1253. How is the corporate name acquired?

1254. What are the rights of a corporation in its name and how are they protected?

1255. What is the effect of a misnomer of a corporation?

1256. How may the corporate name be changed?

1257. What is meant by saying that a corporation has perpetual life or succession?

1258. How is corporate action taken? How are corporate meetings called?

1259. What notice of shareholder's meetings must be given? How is this governed?

1260. What constitutes a quorum of members to take corporate action? May members vote by proxy?

1261. What may be said as to the place of corporate meetings?

1262. What may be said as to the meetings held by directors of a corporation? May they delegate their authority to act for the corporation?

1263. How, or in what form should corporate contracts be executed?

1264. What are the methods by which a corporation may be dissolved?

1265. What may be said as to stock corporation in which one man acquires all of the stock?

1266. What is the effect of dissolution of a corporation, upon the corporate entity? On the property of the corporation? How are the affairs of the dissolved corporation wound up?

Chapter IV.

1267. What are the two theories as to corporate capacity?

1268. How are corporate powers classified? Explain each.

1269. Give the general rules for the construction of corporate charters.

1270. What three things should be investigated to ascertain if the action of the corporatoin is valid?

1271. What may be said as to the power of the corporation to contract debts and borrow money?

1272. When may a corporation issue negotiable instruments?

1273. What is the power of a corporation to issue accommodation paper?

1274. May a corporation become a surety or guarantor?

1275. Has a corporation power to form a partnership?

1276. Has a corporation power to form a trade combination? What effect has state and federal legislation as to

combinations to control or restrict trade had upon this subject?

1277. What may be said as to the attempt of corporations to enter into unincorporated trusts?

1278. What is the effect of an incorporated trust or combination of corporations if the result is to form a monopoly of a particular trade or business?

1279. What may be said as to the power of corporations to consolidate? What is the effect as between the consolidating companies?

1280. At common law and by statute what power have corporations to acquire and hold real property?

1281. What is a corporation's power to take by devise?

1282. Discuss the power of a corporation to acquire personal property?

1283. May a corporation acquire its own shares?

1284. Has a corporation implied power to acquire or hold stock in another corporation? What is the English rule?

1285. What is the power of a corporation to alienate its property? To mortgage its property?

1286. May a corporation be authorized to act in a personal relation, as an agent or attorney?

1287. What may be said as to the corporation's right to sue?

1288. In suits against a corporation what is the presumption as to the citizenship of a corporation? How may service be had upon corporations?

1289. Is it necessary to allege the existence of the corporation in a pleading at law? What conflict in this regard?

1290. Discuss the corporation's right to have and use a seal. What is the effect of a seal when used?

1291. What is meant by a by-law? And what is the corporation's general power in this regard? What is necessary to make by-laws valid? Who are bound to know them?

1292. What is meant by the doctrine of *ultra vires?* What are the several theories as to the effect of ultra vires acts? Do these principles extend to excuse acts of negligence on the part of the corporate management?

1293. When the contract is fully executed on both sides what is the effect if it is ultra vires?

1294. What is the effect of an ultra vires contract which is still executory?

1295. Discuss the effect of a partially executed ultra vires contract.

1296. Who may complain of ultra vires contracts?

1297. Discuss fully the liability of corporations for torts and crimes.

Chapter V.

1298. In general, what are the state's means of controlling corporations?

1299. What limitations on the power of the state to control corporations? What limitations upon the power of Congress to control corporations?

1300. What may be said as to the right of the state to control its own corporations through the courts? What methods of control exist? Describe each.

1301. For what causes may a forfeiture of a corporate charter be had?

1302. What is the effect of the statute of limitations and waiver upon a cause of forfeiture of a corporate charter?

1303. In what ways may the state control corporations through the writ of mandamus?

1304. To what extent may corporations be controlled through courts of equity? May such a court decree dissolution of a corporation?

1305. What may be said as to the method of control by private and public visitor?

1306. What are the general means of the state's control as exercised through the legislature? Name each method.

1307. Define and explain the power of eminent domain.

1308. What may be said as to the state's power to control corporations under its police power?

1309. Explain fully the state's power to tax corporations. What are the elements of corporate taxation? What is the situs of the various forms of corporate property? What is the method of taxing corporate property? What power have the states to tax a national corporation?

1310. What are the limits upon the state's rights to repeal or forfeit a corporate charter?

1311. What limit upon the state's power to amend a corporate charter? What is the power where a right to amend has been reserved by the state?

1312. What is the state's relation as to national corporations.

1313. What are the rights of a foreign corporation in a state?

1314. What may be said of a foreign corporation's right to engage in commerce?

1315. Discuss what is meant by inter-state or foreign commerce.

1316. To what extent has a state the right to exclude a foreign corporation from doing business within its borders?

1317. What are the methods employed in the states of excluding or restricting foreign corporations?

1318. Discuss the power of the national government over state corporations? How may Congress control the trusts?

1319. What may be said as to Congress adopting state regulations, in control of corporations?

1320. How has Congress sought to regulate and control corporations engaged in inter-state commerce?

1321. What may be said as to federal anti-trust acts?

Chapter VI.

1322. What are the duties of corporate promoters?

1323. What liabilities do the promoters assume? Explain fully.

1324. What is the extent of the corporation's liability for the acts of its promoters?

1325. What may be said as to the general relation between the corporation and its officers? Give the various theories as to their relation.

1326. What are the general duties of officers in a corporation? Have they a right to compensation?

1327. What may be said as to the right to remove elective officers in a corporation? Agents?

1328. What may be said as to the officer of a corporation dealing with the corporation? What is necessary to make such dealings valid?

1329. What is the general rule as to the rights of officers to receive salaries?

1330. What is the general relation existing between the corporation and its shareholders?

1331. What right has the corporation to collect subscriptions to stock?

1332. What is meant by a corporate call for the payment of subscriptions? What is necessary that the calls may be valid?

1333. How is membership in a corporation proved?

1334. Who has a right to vote in a corporation? What was the method of voting at common law? How is it now?

1335. What is meant by voting by proxy.

1336. May an irrevocable proxy be validly granted?

1337. Discuss the meaning and effect of voting trusts.

1338. What do you understand by cumulative voting, and what is the purpose to be effected thereby?

1339. What is meant by dividends? When do they belong to the shareholder?

1340. Who is entitled to dividends, and how is it determined?

1341. What may be said as to when the life tenant and when the remainder-man is entitled to the dividends of stock?

1342. What may be said as to the right to transfer shares of stock? May they be transferred to evade liability or in breach of trust?

1343. What is the purpose of registering transfers of shares? What is the effect of a registered transfer?

1344. What effect has a transfer of stock when made upon a forged power of attorney?

1345. What is the effect of a transfer of stock in breach of trust?

1346. How may a gift of stock or shares be made?

1347. What is the effect of a transfer of stock upon the seller and purchaser?

1348. What is the remedy for a refusal on the part of the corporation to transfer shares?

1349. What may be said as to the shareholder's right to inspect the corporate books?

1350. Has the shareholder a right to subscribe for an increase of stock?

1351. Discuss the shareholder's right to sue for money due the corporation.

1352. What may be said as to the state's limitation to amend or repeal a charter in violation of creditors' rights?

1353. What are the rights of creditors against the corporation?

1354. May a corporation prefer creditors?

1355. What are the assets of the corporation regarded as being?

1356. Discuss the right of creditors to prevent dissipation of corporate funds.

1357. Discuss the relation and reciprocal rights and liabilities of creditors and the officers of a corporation.

1358. What may be said as to the statutory liability of officers?

1359. What rights have creditors against shareholders in a corporation? How does the liability of shareholders arise? Discuss each form of the shareholder's liability.

1360. Discuss the effect of the shareholder's agreement

to pay for stock in property on the rights of creditors. Discuss the four cases in which creditors cannot require full payment of corporate shares by the stockholder.

1361. Discuss fully the liability of shareholders under special statutes. How may such liability be established?

1362. When will liabilities penal in form be considered as contractual?

1363. What may be said as to the enforcement of statutory liability of shareholders in other jurisdictions?

PART II.

PUBLIC CORPORATIONS.

Chapter I.

1364. What is included in the subject of public corporations?

1365. Discuss the pre-requisites to the creation of a public corporation. Is the name important?

1366. What is the general method of creating public corporations? In England? In the United States?

1367. Discuss fully how public and private corporations are to be distinguished.

1368. What may be said as to distinguishing public and municipal corporations?

1369. How are public corporations clasified for convenience? Define and explain each class.

1370. Name some of the authorities on public or municipal corporations.

Chapter II.

1371. What three types of political communities with corporate powers in America? Discuss each of these types.

1372. Explain and discuss the peculiar characteristics of so-called administrative corporations.

1373. Discuss counties as administrative corporations. How are they created?

1374. Name and discuss the governing power in a county. Is a county embraced within the meaning of the term municipal corporation?

1375. Discuss the principles governing commissioners when acting as an auditing board in the county. What may be said as to the liability of the county for the acts of its servants and officers?

Chapter III.

1376. Name and discuss the modes of creating municipal corporations in England.

1377. What are the modes of creating municipal corporations in the United States? Discuss each method.

1378. Discuss the subject of legislative control of municipalities. Wherein does it differ from the control of private corporations? What may be said as to the power of the state legislature to compel a municipality to perform obligations of a moral nature? What is the authority of the legislature over municipal officers?

Chapter IV.

1379. Name the several types of municipal charters? Explain and discuss each type.

1380. Describe the general method of classifying cities when incorporated under general laws. Mention some of the statutory provisions in regard to the granting of municipal charters.

1381. What may be said as to charters under judicial sanction?

1382. What is the method of proving muuicipal charters? Do courts take judicial notice of them?

1383. Discuss the method of proving municipal ordinances.

1384. Mention and discuss the canons of construction as applied to municipal charters. How is the taxing power of the city limited? What power has the city to sell or surrender its legislative powers? What two kinds of provisions in municipal charters? Describe and discuss each kind.

1385. What classification of charter powers is made?

1386. Discuss fully a city's special charter powers over parks and public squares.

1387. What are the city's charter powers as to wharves and docks? Discuss fully.

1388. What may be said as to the power of the city to maintain and control wharves? What care must the city exercise in its maintenance of public docks?

1389. What may be said as to the special power to control ferries? When will such power be deemed exclusive?

1390. What are the cities' powers as to providing for the public health? How is this power usually conferred? How construed?

1391. Discuss the city's charter powers as to the control

of public markets. What does this power include? What are the incidents to the establishment of a public market?

1392. Discuss the city's power to maintain a fire department. What may be said as to the city's liability for negligent acts of its servants in the fire and health departments? Why?

1393. What is the city's power over city water supply? What are the liabilities of the city in this regard?

1394. Discuss the city's power over public lighting. When may the city grant exclusive franchises to corporations for lighting? Is a city required to light its streets?

1395. What is meant by a nuisance? What two kinds of nuisances? Discuss the city's power to deal with nuisances.

1396. What two classes of limitations upon the powers of municipalities?

1397. Discuss the limitations upon the municipalities' power to borrow money. What distinction as to the city's power to borrow money for a future debt, or one already contracted?

1398. What limitations are usually fixed on municipal indebtedness? What exception exists to these limitations?

1399. Discuss the city's right to offer a reward for the apprehension of offenders, and to defend its officers when sued.

Chapter IV.

1400. With what is this chapter to deal?

1401. How is the name of a municipality obtained? What is the usual form of the name in England? In the United States? How may a name be acquired where none is given when created?

1402. Discuss the right of a municipality to have and use a corporate seal.

1403. What may be said as to the right of the municipality to hold corporate meetings? Of what two kinds are these meetings?

1404. How does the municipality take action? What are the requisites of a valid corporate meeting? How were they determined at common law? What may be said as to the necessity of a quorum to take corporate action? Can councilmen vote on matters in which they are personally interested in a financial way?

1405. Discuss the necessity of municipal records, and how they may be amended. How may their possession be secured?

1406. What is meant by a municipal ordinance? How is it distinguished from a resolution? In what capacity does

the council pass ordinances? May this power be delegated? Why?

1407. What is necessary for the enactment of valid ordinances?

1408. Discuss the implied limitations upon the power of a city to pass ordinances. How is the reasonableness of an ordinance to be determined? What liability attaches to members of the council as regards the passing of ordinances? Why? What limitations upon the power of the city to regulate trades or professions?

1409. What may be said as to the necessity of publishing ordinances? Discuss the requirement as to the mayor or president of the council signing ordinances.

1410. How are municipal ordinances proved? Who has the burden of proving that an ordinance was regularly passed?

1411. Discuss the power to enforce municipal ordinances by fine and imprisonment.

1412. What persons are required to take notice of municipal ordinances?

1413. Discuss the power of the municipality to impose licenses. What limitation upon this power? What division of the subjects on which the city may impose licenses is made? What is the distinction as to the power to tax in these cases? May a license be made so large as to prohibit the trade or calling? May it restrict the trade?

1414. What is the effect of a municipal ordinance which is in conflict with the general law of the state? When they impose a punishment upon a matter regulated by state statute?

1415. What powers are included under the general welfare clause in a municipal charter?

1416. What is the procedure to enforce municipal ordinances? Describe each method. Which is the most usual?

Chapter V.

1417. What is meant by municipal courts? What is the common form of such a court at present? What powers do they have? What is the method of procedure? How extensive is their jurisdiction?

1418. Discuss the subject of municipal property as to the amount a city may own or acquire, and for what purposes. What power has the city to alienate its property?

1419. What are the various holdings as to selling the property of a city to satisfy its debts?

1420. How do municipalities acquire property? What is

meant by dedication? What principles as to municipal property are derived from the case in 6 Peters, 431?

1421. How may the fact of dedication be established? Discuss each method. How may the acceptance of the property dedicated be made by the city? What power to alienate or change the use of dedicated property has the city?

Chapter VI.

1422. What may be said as to the use to which the streets of a city may be put?

1423. Discuss the power of a city to authorize the use of its streets for new purposes, as by telephone and telegraph companies, railroad and street car companies. How are the rights of the public affected by such new use? What protection have they? What power has the city to regulate the use of the streets for such new purposes?

1424. What limitations on the control of the city over its streets arise from the acts of Congress in regard to Post roads? Describe fully.

1425. What may be said as to railways in the streets and highways constituting a double or new use of the streets? What distinction is made as regards the ownership of the fee to the streets? When must compensation be made to the abutting owners for such new use?

1426. What are the remedies for a wrongful use of the streets?

Chapter VII.

1427. What may be said as to the power of a city to make public improvements? Describe some of the public improvements the city may make, and its method of meeting the expense of same. What remedies has the city to collect its assessment for public improvements?

1428. Discuss the liability of municipalities for their torts.

1429. How are municipal corporations dissolved in England?

1430. Why are not the methods of dissolution in England applicable to cities in the United States? How may a municipality be dissolved in this country? What is the effect of such dissolution upon the rights of creditors of the dissolved municipality?

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 718 222 3
LIBRARY
LOS ANGELES, CALIF.